Supreme Court, U.S.
FILED
NOV 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation
M.D.L. 310,

ADAMS EXTRACT COMPANY, ET AL.,
Petitioners,

vs.

CHARLES J. FRANEY AND ALEX HOPKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether a court has authority to determine that testimony will be "derived from" previously immunized testimony pursuant to the federal immunity statute, 18 U.S.C. § 6002, in the context of a motion to compel testimony over a claim of Fifth Amendment privilege?

2. Whether a witness may be ordered to testify over a claim of privilege against self-incrimination where it is determined that his testimony will be "derived from" previously immunized testimony and thus unavailable for use in future criminal prosecutions?

3. Whether deposition testimony is "derived from" previously immunized testimony under the federal immunity statute, 18 U.S.C. § 6002, where a transcript of the immunized testimony is used by deposing counsel to formulate the deposition questions?

Parties To The Proceeding Below

Plaintiffs:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company Inc.
Denver Meat Co.
District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.

Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics Inc.
Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Gold Supply Co., Inc.

Non-Party Deponent-Appellants:

Charles Jerome Franey
Philip Fleischacker
Alex Hopkins

Non-Settling Defendant In *In re Corrugated Container Antitrust Civil Litigation,* M.D.L. 310:

The Mead Corporation

Other Defendants In *In re Corrugated Container Antitrust Civil Litigation,* M.D.L. 310:

Alton Box Board Company
Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Corco, Inc.
Crown Zellerbach Corporation
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Georgia-Pacific Corporation
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers Inc.
Menasha Corporation
Olinkraft, Inc.

Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation
St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U.S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Willamette Industries

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vs.

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals, *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey, Appeal of Philip Fleishacker, Appeal of Alex Hopkins* (hereinafter, *Corrugated*), are reported at 620 F.2d 1086 (5th Cir. 1980) and are set forth in the Appendix at pp. 1a-17a. The opinions and orders of the United States District Court for the Southern District of Texas adjudging

Respondents Franey and Hopkins in civil contempt have not been reported. They are set forth in the Appendix at pp. 1b-5b, and pp. 6b-8b, respectively. The order of the Court of Appeals denying Petitioners' timely petition for rehearing and rehearing *en banc* is set forth in the Appendix at p. 1c.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit vacating the orders of contempt for failure to testify, was entered on June 19, 1980. A timely petition for rehearing and for rehearing *en banc* was denied on August 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

The federal immunity statute, 18 U.S.C. §§ 6001-6003 (1976) provides in pertinent part:

> [N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .

18 U.S.C. § 6002.

STATEMENT OF THE CASE

Plaintiffs in this massive antitrust litigation seek review by this Court of a decision of the Court of Appeals for the Fifth Circuit, vacating, by a 2-1 vote, orders (the "Orders") of the District Court for the Southern District of Texas (the "District Court") adjudging Charles Franey ("Franey") and Alex Hopkins ("Hopkins") to be in contempt of court for refusing to answer questions propounded at their civil depositions. The

Court of Appeals vacated the Orders, ruling that Franey and Hopkins legitimately feared self-incrimination from answering the deposition questions.[1]

Franey and Hopkins are non-party witnesses in this private treble damage action against defendant manufacturers of corrugated containers.[2] Both Franey and Hopkins were employees of defendants during the period of the alleged price-fixing conspiracy and both testified under grants of "use" immunity pursuant to 18 U.S.C. § 6001 *et seq.* prior to or during the criminal trials which preceeded these civil actions. Hopkins testified under separate grants of statutory "use" immunity before a federal grand jury and at trial. Franey testified at trial under a grant of statutory "use" immunity and also testified in an interview conducted by the Department of Justice pursuant to a letter grant of "use" immunity.[3]

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[1] Philip Fleischacker had also appealed the District Court's order of contempt entered against him for his refusal to testify. The circumstances of his claim of Fifth Amendment privilege were identical to those of Franey and Hopkins and the three appeals were consolidated. Because Fleischacker appeared for deposition in New York under subpoenas issued by the District Court for the Southern District of New York, the Court of Appeals for the Fifth Circuit dismissed Fleischacker's appeal for lack of jurisdiction. (pp. 5a-8a.) Fleischacker's appeal is now awaiting decision before the Second Circuit Court of Appeals, *In re Corrugated Container Antitrust Litigation, M.D.L. No. 310, Appeal of Philip Fleischacker,* Docket No. 80-1090.

[2] Prior to trial, all but three defendants in this action entered into settlements with the Plaintiff class totaling over $300 million. Two additional defendants settled during trial. Mead Corporation did not settle and following fourteen weeks of trial, a jury found Mead to be guilty of the alleged price-fixing conspiracy and liable to Plaintiff class in excess of $1 billion. Judgment has not yet been entered against Mead. Appeals are expected.

[3] The Court of Appeals did not consider the validity of the letter grant of immunity because "the district court could have based its order compelling Franey to answer deposition questions solely on the grant of statutory immunity." (p. 11a, n.4)

Following the conclusion of the criminal trial, plaintiffs sought and obtained complete transcripts of Franey and Hopkins' immunized testimony in each of the above proceedings. In preparation for the civil depositions of Franey and Hopkins, deposing counsel reviewed and studied the questions and answers which comprised the immunized testimony. At the civil depositions, the questions asked Franey and Hopkins by deposing counsel, as found by the District Court, were limited to questions taken verbatim from their respective immunized testimony or questions directly based on and derived from that immunized testimony. (pp. 3b, 7b.) Despite this clear use of each witness' own immunized testimony in developing the deposition questions asked of them, both Franey and Hopkins refused to answer all substantive questions, claiming the Fifth Amendment privilege against self-incrimination.[4]

The District Court ordered both Franey and Hopkins to answer the propounded questions, ruling that use of the immunized testimony in developing the deposition questions asked of Franey and Hopkins would render their answers so clearly and thoroughly derived from the immunized testimony so as to be unusable in future criminal prosecutions against them. (pp. 3b, 7b.) In reaching its determination, the District Court relied on the decision of the Court of Appeals for the Eighth Circuit in *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), where the court, on identical facts, compelled testimony over a claim of privilege.

In a 2-1 decision, the Fifth Circuit vacated the District Court's Orders of contempt, finding that the District Court "acted improperly in ruling that there existed no danger of self-incrimination." (p. 2a.) The majority did not dispute the District Court's factual finding that the deposition questions were taken verbatim or derived from the transcripts of Franey and Hopkins' immunized testimony. The Court of Appeals held, however, that a court lacked authority, in the context of a

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[4] Franey and Hopkins were among over one hundred witnesses in this litigation who asserted the Fifth Amendment privilege against self-incrimination and refused to testify.

motion to compel testimony, to determine whether testimony would be "derived from" immunized testimony pursuant to 18 U.S.C. § 6002, stating that:

> [I]t was inappropriate for the [District] Court, . . . [in determining] whether the witnesses were entitled to invoke the fifth amendment, to consider whether the testimony was "tainted" such that it could not be used against them in future prosecutions.

(p. 12a.)

While the majority recognized that section 6002 "contemplates that district courts will have the responsibility to determine what is derived use of immunized testimony," the Fifth Circuit held that "the authority to make that determination is limited to the situation where the witness has been indicted and the Government is seeking to introduce evidence to secure a criminal conviction." *Id.*

Judge Frank M. Johnson, in dissent, recognized that "(i)t has always been for the courts to determine whether an assertion of the privilege is proper", and that "(c)ourts have also always decided the taint question—whether evidence should be excluded as derivative of immunized testimony". (p. 16a, citations omitted.) He concluded that it was well within a court's authority to make a prospective determination of taint and that "any prosecutorial use of the deposition testimony, required by the district judge would, without any question, be barred as derivative of the compelled evidence." *Id.*

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT BETWEEN THE COURTS OF APPEALS

The Fifth and Eighth Circuits are in direct conflict over the issues raised in this Petition. In a situation identical to the one at bar, the Eighth Circuit, in *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979), compelled civil deposition testimony over a claim of Fifth Amendment privilege where deposing counsel used the deponent's prior immunized testimony to develop subsequent deposition questions asked of him.

Like Franey and Hopkins, Starkey was a key employee of a company indicted by the federal government for criminal price fixing. Starkey testified before a federal grand jury investigating the alleged price fixing under a grant of "use" immunity pursuant to 18 U.S.C. § 6001 *et seq.* Following conclusion of the criminal proceedings, in which all defendants plead *nolo contendere,* the State of Arkansas commenced a civil treble damage action against Starkey's employer. During discovery in the civil case, Starkey's immunized grand jury testimony was made available to plaintiff.

As in the case at bar, deposing counsel used Starkey's immunized testimony to question him at his civil deposition. Many of the deposition questions were taken verbatim from the immunized testimony while the balance were follow-up questions derived from the immunized testimony. Starkey refused to answer these questions claiming the Fifth Amendment privilege against self-incrimination. The Eighth Circuit found, however, that the "obvious dependence on the [immunized] grand jury testimony in the deposition questions" would leave the deposition testimony "tainted and unavailable for criminal prosecution", *Id.* at 1047, and ordered Starkey to answer questions "within the same time, geographical and substantive

framework as the grand jury testimony." *Id.* at 1048. The court specifically rejected the notion that it was exceeding its authority in compelling the testimony, finding instead that it was "merely fulfilling its proper duty to determine what is a derived use of immunized testimony." *Id.*

Thus faced with identical factual situations, the Eighth Circuit compelled a witness to testify over a claim of privilege while the Fifth Circuit, in this case, permitted a witness to remain silent. In addition to this conflict in results reached by the Circuits, the underlying rationale for the Fifth Circuit's ruling—that it lacked *authority* to determine whether testimony is "derived from" immunized testimony in any context other than "the situation where the witness has been indicted and the Government is seeking to introduce evidence to secure a criminal conviction"—is in conflict with a decision by Justice (then Judge) Stevens for the United States Court of Appeals for the Seventh Circuit and a decision by a separate panel of the Eighth Circuit. In *Patrick* v. *United States,* 524 F.2d 1109, 1120 (7th Cir. 1975), Justice Stevens made a prospective determination of taint in a suit to enjoin the assessment of a tax. In *Little Rock School District* v. *Borden, Inc.,* 1930-2 Trade Cases ¶ 63,522 at p. 76,783 (8th Cir. 1980), the Eighth Circuit specifically upheld the authority of a court to determine derived use in the context of a motion to compel testimony over a claim of privilege.[5]

Because there is a clear conflict between the Circuits as to the circumstances in which testimony can be compelled over a claim of privilege and as to the authority of a court to make determinations necessary to analyze the propriety of a Fifth Amendment claim, certiorari should be granted.

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[5] The Court in *Borden* held that deposition testimony could be derivative of prior immunized testimony even absent deposing counsel's use of the immunized testimony. Petitioners do not assert this broader position herein.

II.

THE WRIT SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' ERRONEOUS DETERMINATION THAT A WITNESS CANNOT BE COMPELLED TO TESTIFY WHERE HIS TESTIMONY WOULD BE DERIVED FROM HIS PREVIOUSLY IMMUNIZED TESTIMONY

The Fifth Circuit was plainly in error in holding that a witness could not be compelled to testify over his Fifth Amendment objection where his testimony is "directly or indirectly derived from" his previously immunized testimony. Because the tainted testimony could not be used against the witness in a subsequent criminal prosecution, the basis for any Fifth Amendment objection disappears. Permitting invocation of the Fifth Amendment under such circumstances, as the Court of Appeals did here, is a needless restriction on the fundamental right and duty of the federal courts to best ascertain the truth from all available evidence.

The Fifth Amendment to the United States Constitution protects a person from being forced to give testimony which can be used against him in a criminal proceeding. However, under the federal immunity statute, 18 U.S.C. § 6002,

> [N]o testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony* or other information) may be used against the witness in any criminal case.... (Emphasis added.)

Thus, if deposition testimony is "directly or indirectly derived from" immunized testimony, it cannot be used in a future prosecution of the witness, and testimony, which may be necessary to reach a truthful resolution of the litigation may, and therefore, must be compelled. *Kastigar* v. *United States,* 406 U.S. 441 (1972). Common sense and substantial case precedent support this conclusion.

Once a witness has testified under a grant of "use" immunity, a "very heavy burden" attaches to evidence offered in a subsequent criminal prosecution of the witness.

> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Kastigar, supra, 406 U.S. at 460. Courts have strictly construed the requirement that subsequent evidence be "wholly independent" of the compelled testimony such that *any* showing of *use* of compelled testimony in developing subsequent evidence taints the subsequent evidence. *See, e.g., United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977); *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973).

Applying this strict standard to the facts of this case, it cannot be questioned that where deposing counsel use immunized testimony to develop deposition questions, the subsequent testimony will be "derived from" the immunized testimony. The Eighth Circuit made this very ruling in *Appeal of Starkey, supra.*[6] The Court of Appeals' refusal to apply this rule in this case on the ground that it lacked authority to determine the "taint" issue is erroneous.

Because the privilege against testifying frustrates the search for truth, courts have always exercised their inherent power —and indeed their obligation—to determine the circumstances

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[6] In the only other decision written on this issue, a court determined that testimony could not be compelled because the questioner did not even have access to the immunized testimony and thus could not have *used* the immunized testimony as a basis for the subsequent deposition questions:

> Here, plaintiffs have not had access to the witnesses' grand jury testimony: the questions plaintiffs have asked are not based on the immunized testimony, but rather on the much broader discovery which has occurred in this civil case. . . .

In re Folding Carton Antitrust Litigation, 465 F.Supp. 618 (N.D. Ill.), *rev'd on other grounds,* 609 F.2d 867 (7th Cir. 1979).

in which an assertion of the privilege would be proper. *Marchetti* v. *United States,* 390 U.S. 39, 53 (1968); *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951). When the privilege is improperly asserted, courts have always compelled the witness to testify:

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if it clearly appears to the court that he is mistaken.

Id.

In assessing the validity of a Fifth Amendment claim, courts have routinely determined the applicability of statute of limitations, double jeopardy, or immunity bars which would either eliminate the possibility of future prosecutions of the witness or prevent use of the witness' testimony in a future criminal action. Courts have not hesitated to reach these complex issues in the context of a motion to compel testimony over a claim of privilege despite the fact that statute of limitations, immunity and double jeopardy bars are normally only considered as affirmative defenses during criminal trials. Certainly nothing in the immunity statute itself or in any case cited by the majority below limits the circumstances in which a court may determine derived use.

Moreover, compelling testimony "derived from" immunized testimony over a claim of privilege does not amount to a judicial creation of immunity.[7] A court is no more "creating"

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[7] The case of *Ellis* v. *United States,* 416 F.2d 791 (D.C. Cir. 1969), cited by the majority below (p. 14a, n.7) as an example of judicial "creation" of immunity is easily distinguishable. In *Ellis,* there was no prior grant of immunity. The district court compelled testimony over a claim of privilege *solely* because of the after-the-fact exclusionary rule which prevents evidence from being introduced against a witness where it has been compelled over his claim of privilege. *See In re Folding Carton Antitrust Litigation,* 609 F.2d 867, 872, n.11; *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964). Since nothing else prevented the testimony from being used in a subsequent prosecution (i.e. statute of limitations, double jeopardy, immunity, waiver) the district court was found to have "created" immunity. *Ellis, supra,* 416 F.2d at 796.

immunity when it determines derivative use than when it denies the privilege because a statute of limitation or double jeopardy would bar future prosecution. In each of these situations, the court's obligation is the same: to determine whether the witness has a real and substantial fear of prosecution from testifying. *United States* v. *Apfelbaum,* 63 L.Ed2d 250, 262 (1980). In each of these situations, it is for the court to decide whether the operative statute effectively bars use of the testimony in a future prosecution and to overrule a claim of privilege if it does.

Thus the Fifth Circuit erred in deciding that it lacked authority to determine derived use in the context of a motion to compel and erred in refusing to compel the testimony of Respondents herein. This Court should grant certiorari to prevent future applications of the Court of Appeals' erroneous rulings.

III.

THE WRIT SHOULD BE GRANTED TO RESOLVE IMPORTANT QUESTIONS CONCERNING ADMINISTRATION OF THE JUDICIAL SYSTEM AND TO PREVENT UNWARRANTED REFUSALS TO TESTIFY

Whether deposition testimony derived from immunized testimony can be compelled over a claim of Fifth Amendment privilege is an important, continually recurring question of law. While Petitioners suggest above that this Court's decision in *Kastigar* controls the analysis of the issue presented here, the opinion of the Fifth Circuit emphatically denies *Kastigar's* applicability. The Fifth Circuit has either misunderstood its role in applying this Court's directive or "derived" testimony is indeed conceptually different from any other evidence derived from use of immunized testimony. In either case, the issues presented are so fundamental to an ordered system of both justice and personal liberties and so often recurring in cases before the courts, that they should be addressed and resolved by this Court.

For centuries the Anglo-American legal systems have granted to the courts the general authority to obtain every person's testimony. While there is, without question, a limitation imposed on this power to preserve the fundamental freedom from self-incrimination, important private litigation[8] may be severely handicapped by wholesale invocation of the Fifth Amendment. Indeed, those witnesses best able to aid the court to reach a correct judgment by truthfully testifying to wrongdoing are precisely those persons who invoke the Fifth Amendment.

While witnesses may of course withhold testimony if it can be used against them in future criminal proceedings, where, as here, witnesses have given critical testimony under immunity, their knowledge can be made available in the form of "derived" testimony without jeopardizing their Fifth Amendment rights. Yet, in the absence of a uniform rule enunciated by this Court, the ability to compel testimony from such witnesses and the witness' ability to protect themselves from incrimination has been dependent upon the jurisdiction in which they are found.

The case at bar presents a prime example of the anomolous results the existing conflict between the Circuits may generate. Another witness in this action, Philip Fleischacker, was compelled to testify over his claim of privilege for the same reasons Franey and Hopkins were compelled to testify. However, because Fleischacker was found and served with a subpoena to testify in New York, the Fifth Circuit dismissed his appeal for lack of jurisdiction and the validity of his claim of privilege is now being determined by the Second Circuit. Thus, without direction from this Court, even witnesses in the same

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[8] This Court has often recognized that Congress sought to encourage private litigants to assist federal and state governments' enforcement of national economic policies, as expressed in the antitrust laws, including Section 1 of the Sherman Act. *See e.g., Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251, 262 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 336 (1971); *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 139 (1968).

case may be subject to different Fifth Amendment standards and litigants may be unable to obtain important testimony solely because witnesses are found in certain jurisdictions.

Equally troubling is the Fifth Circuit's refusal to exercise its authority to determine the taint issue in considering the propriety of a Fifth Amendment claim. The need for exercise of this authority is clear: should courts abstain from deciding questions relevant to determination of the privilege during a motion to compel, there would be no mechanism to regulate its exercise; witnesses could simply refuse to testify even though they had no legitimate basis for doing so. Such a result would cripple the fact finding process and expand the bounds of the Fifth Amendment privilege beyond anything contemplated by its framers or approved by this Court in *Kastigar*. Allowing the Fifth Circuit's abstention to stand will permit important witnesses to improperly block the search for truth by refusing to testify and will severely undercut judicial authority to determine the factual basis behind Fifth Amendment claims.

CONCLUSION

For all of the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit vacating the District Court's Orders of contempt for refusal to testify.

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November 12, 1980

APPENDIX A

In re CORRUGATED CONTAINER ANTI-TRUST LITIGATION.

Appeal of Charles J. FRANEY.

In re CORRUGATED CONTAINER ANTI-TRUST LITIGATION.

Appeal of Philip FLEISCHACKER.

In re CORRUGATED CONTAINER ANTI-TRUST LITIGATION.

Appeal of Alex HOPKINS.

Nos. 80-1284, 80-1307 and 80-1338.

United States Court of Appeals,
Fifth Circuit.

June 19, 1980.

Rehearing and Rehearing En Banc
Denied Aug. 14, 1980.

Appeals from the United States District Court for the Southern District of Texas.

Before TJOFLAT, FAY and FRANK M. JOHNSON, Jr., Circuit Judges.

TJOFLAT, Circuit Judge:

Phillip Fleischacker, Charles J. Franey, and Alex Hopkins bring these consolidated appeals from orders of the District Court for the Southern District of Texas holding them in civil contempt for invoking the fifth amendment privilege against self-incrimination and refusing to answer questions posed to

them at civil depositions.[1] The court had instructed them to answer the questions, ruling that the fifth amendment right to remain silent was unavailable to them since their deposition testimony could not possibly be used against them in any future criminal proceeding. We vacate the orders holding Franey and Hopkins in contempt because we conclude that the court acted improperly in ruling that there existed no danger of self-incrimination. We must dismiss Fleischacker's appeal for lack of jurisdiction.

I.

Fleischacker, Franey, and Hopkins are non-party witnesses in *In re Corrugated Container Antitrust Litigation,* M.D.L. No. 310, a private, multidistrict, antitrust action. That litigation was set on foot by a two-year federal grand jury investigation of allegations of price-fixing in the corrugated paper container industry. The grand jury investigation resulted in felony indictments against nine manufacturers of corrugated products and nine individuals and misdemeanor indictments against an additional five manufacturers and seventeen individuals. There followed a criminal trial in the district court for the Southern District of Texas. A jury acquitted those defendants who stood trial of all charges.

Fleischacker and Hopkins both testified before the grand jury after the district court, acting on the Government's petition, had entered an order granting them "use" immunity pursuant to 18 U.S.C. §§ 6001-6003 (1976) (immunity statute). Although Franey was not subpoenaed to appear before the grand jury, he submitted to an interview with Department of

[1] Pursuant to the recalcitrant witness statute, 28 U.S.C. § 1826 (1976), the district court sentenced each of the appellants to sixty days imprisonment and a fine of five thousand dollars. The court stayed execution of the sentences pending the filing and determination of these appeals.

Justice attorneys in exchange for a letter from the Department of Justice promising that any information he revealed would not be used against him in any criminal proceeding. The Government transcribed the Franey interview and presented it to the grand jury. During the criminal trial, the Government called Franey and Hopkins as witnesses. They testified after the prosecutor obtained orders granting them statutory use immunity.

While the grand jury investigation and the subsequent criminal trial were in progress, purchasers of corrugated products filed forty-four class and eleven non-class treble damages actions against corrugated product manufacturers, some of which were indicted by the grand jury. The plaintiff purchasers alleged that the defendants had engaged in a nationwide conspiracy to fix the prices of corrugated containers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). The Judicial Panel for Multidistrict Litigation consolidated those actions, pursuant to 28 U.S.C. § 1407 (1976), in the Southern District of Texas under the caption *In re Corrugated Container Antitrust Litigation.*

After the conclusion of the criminal trial, the plaintiff class in the consolidated civil action subpoenaed Fleischacker, Franey, Hopkins, and numerous other witnesses who had testified before the grand jury or during the criminal trial, requiring them to appear for depositions and to produce documents. Fleischacker, Franey, and Hopkins were all employees of defendant corporations during the period of the alleged price-fixing conspiracy. Fleischacker was deposed in New York, New York on January 22, 1980, and Hopkins, in Houston, Texas on January 30, 1980. Both refused to answer any questions concerning their alleged knowledge of or participation in the alleged price-fixing conspiracy, asserting their fifth amendment privilege against self-incrimination. Franey was deposed in Houston on March 4, 1980, and he, too, responded with silence to every substantive question. That same day, the

plaintiff class went before the district court in Houston, seeking an order compelling Franey to testify. On the court's order, Franey appeared for deposition in open court on March 5, 1980. After listening to the questions, the court ordered Franey to answer. Again, he refused.

On March 6, the court entered Pretrial Order No 40, adjudging Franey in civil contempt. The court concluded that the fifth amendment privilege was not available since, "[c]learly, Mr. Franey cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar* v. *United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)." Record in No. 80-1284, vol. 1, at 12. The court explained:

> This is because all the questions are either taken verbatim from the transcripts of his immunized testimony [in his interview with the Department of Justice attorney and at the criminal trial] or are so closely related in subject matter and so clearly derived from the immunized testimony as to be thoroughly tainted and inadmissible against him in any conceivable future prosecution.

Id. at 14.

Also on March 6, the court granted the class plaintiffs' motion to enter Pretrial Order No. 39. That order provides that the Honorable John V. Singleton, Jr., Judge of the United States District Court for the Southern District of Texas shall exercise the powers of a District Judge for the Southern District of New York for the purpose of overseeing the deposition of Philip Fleischacker.

Class plaintiffs obtained a subpoena from the United States District Court for the Southern District of New York requiring Fleischacker to appear for a continuation of his deposition in New York on March 10, 1980. Judge Singleton, in Houston, presided over that deposition by means of a speaker-phone connection. Deposing counsel asked Fleischac-

ker a series of questions taken verbatim from the transcript of his immunized grand jury testimony[2] and further questions that counsel said were "derived" from the immunized testimony. Although Judge Singleton ordered Fleischacker to answer, he persisted in his invocation of the fifth amendment. Judge Singleton held him in contempt of court, citing the reasons set forth in Pretrial Order 40. Record in No. 80-1307, vol. 2, at 71.

Hopkins' deposition resumed in Houston on March 19, 1980. When Hopkins asserted his fifth amendment privilege, the deposition was recessed and continued in open court before Judge Singleton. Counsel asked him questions taken verbatim from his grand jury and trial testimony and questions purportedly "derived" from the immunized testimony. The court held Hopkins in contempt for his continued refusal to answer. Again, the court's order is based on a ruling that the answers to the questions "would be so clearly and thoroughly derived from the immunized testimony that they could never be used to prosecute Mr. Hopkins and therefore that he has no legitimate fear of self-incrimination. . . . " Record in No. 80-1338, at 24.

II

Fleischacker first raises the issue whether the Fifth Circuit Court of Appeals has jurisdiction to decide his appeal. We agree with him that this court lacks jurisdiction and that the appeal should be heard by the Court of Appeals for the Second Circuit.

The District Court for the Southern District of New York issued the subpoena requiring Fleischacker to appear for the March 10 deposition under the authority of Fed.R.Civ.P. 45. Rule 45(d)(2) provides:

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[2] In February 1980 the court had ordered the Government to disclose to the plaintiff class the transcripts of the grand jury testimony of numerous witnesses, including Fleischacker, Franey and Hopkins. That order is now on appeal before the Fifth Circuit in a separate proceeding.

> A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

This rule makes it clear that Fleischacker, who was in the vicinity of New York, could have been required to appear for a deposition only in, or near, New York. He certainly could not have been compelled to travel to Houston, in the Southern District of Texas, to be deposed. As a non-party witness, he was not even subject to the jurisdiction of the District Court for the Southern District of Texas.[3] The policy behind the rule is to avoid unnecessary inconvenience and expense to deponents.

The same policy concern underlies Fed.R. Civ.P. 37, which governs the imposition of sanctions upon persons unjustifiably resisting discovery. Rule 37(a)(1) provides: "An application for an order to a deponent who is not a party shall be made to

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[3] As the court observed in *Lincoln Laboratories, Inc.* v. *Savage Laboratories, Inc.*, 27 F.R.D. 476, 477, 478-79 (D.Del.1961):

> It is obvious that the court in which the action is pending stands in a different position as to parties, or officers or agents of corporate parties, as to whom it has personal jurisdiction that it does as to "disinterested" witnesses of whom it has no personal jurisdiction, and especially where the deposition is taken in a district other than that in which the litigation is pending. . . .
>
> If the party or witness refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of *that court.* If this witness was a "disinterested witness", the court in the district where the litigation is pending would ordinarily have no jurisdiction over that witness and could not hold him in contempt.

the court in the district where the deposition is being taken." This provision indicates that the only court that had the power to compel Fleischacker, a non-party deponent, to answer questions at a deposition conducted in the Southern District of New York was the district court sitting in that district. Rule 37(b)(1) provides that the power to enter sanctions against a deponent who disobeys an order to answer deposition questions also belongs to the court in the district in which the deposition is being taken.

If *In re Corrugated Container Antitrust Litigation* were not a section 1407 multidistrict case, then, there could be no question that a subpoena requiring Fleischacker to appear for a deposition would have to be issued by the District Court for the Southern District of New York—or, perhaps, the District Court for the District of New Jersey—as would an order compelling him to answer questions or an order holding him in contempt of court for refusing to answer. Of course, an appeal from that contempt order would be proper only in the Second Circuit Court of Appeals, "the court of appeals for the circuit embracing the district" in which the reviewable decision was rendered. 28 U.S.C. § 1294 (1976).

Under section 1407(b), the judge to whom a multidistrict case is assigned, "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." It was this provision that enabled Judge Singleton to preside over Fleischacker's deposition in New York. In ordering Fleischacker to respond and in holding him in contempt, Judge Singleton was exercising the powers of a district judge of the District Court for the Southern District of New York. As the legislative history of section 1407 indicates, his actions were limited by the ordinary operation of the Rules of Civil Procedure:

> By the term "pretrial proceedings" the committee has reference to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure.

H.R.Rep. No. 1130, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Admin.News, pp. 1898, 1900.

Judge Singleton recognized in Pretrial Order No. 39 that the purpose of the section 1407 mechanism is to maximize the efficiency of discovery in multidistrict cases:

> This court will preside rather than appoint a deposition judge because the matters to be examined and the objections which will probably arise are so inextricably interwoven with the delicate and complex structure of this litigation as to make it extremely difficult for a judge unfamiliar with the whole case to preside.

Record in No. 80—1307, at 1. This purpose may be fully served without considering Judge Singleton's orders compelling Fleischacker to testify and holding him in contempt to be orders of the District Court of the Southern District of Texas. And to consider them such would be contrary to the provisions of Rule 37 requiring that orders directed to recalcitrant deponents be issued in the district in which the deposition is taken. Moreover, it would defeat the Rules' strong policy of minimizing inconvenience to non-party witnesses to require Fleischacker and others in his position to travel thousands of miles to appeal a Rule 37(b)(1) contempt order.

Therefore, we must conclude that this court lacks jurisdiction to hear Fleischacker's appeal.

III

We now turn to the question whether the trial court erred when it entered the orders holding Franey and Hopkins in contempt.

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This privilege against compulsory self-

incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. . . ." *Kastigar* v. *United States,* 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). A witness may properly invoke the privilege when he "reasonably apprehends a risk of self-incrimination, . . . though no criminal charges are pending against him, . . . and even if the risk of prosecution is remote." *Wehling* v. *Columbia Broadcasting System,* 608 F.2d 1084, 1087, n. 5 (5th Cir. 1979) (citations omitted).

The *Wehling* test indicates that a court must ordinarily make two inquiries to determine whether a witness is entitled to assert the privilege and refuse to respond to questioning. First, the court must determine whether answers to the questions might tend to reveal that the witness has engaged in criminal activities. If the answers could not be incriminatory, the witness must answer. *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972). If answering the questions might incriminate the witness, the court must next ask whether there is a risk, even a remote risk, that the witness will be prosecuted for the criminal activities that his testimony might touch on. As the Seventh Circuit recently observed:

> [This determination does not depend] upon a judge's prediction of the likelihood of prosecution. Rather, . . . it is only when there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well taken. . . . When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster.

In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979) (citations omitted).

We have no doubt that Franey and Hopkins have met both requirements of this test. The plaintiff class seeks their testimony concerning their knowledge of and participation in the

alleged nationwide price-fixing conspiracy. Their answers to the deposition questions may well reveal that they have violated federal and state criminal antitrust laws. The risk that they will be prosecuted for such crimes is certainly more than fanciful. There has been no suggestion that the applicable statutes of limitations have run, and, as Hopkins has testified, a federal grand jury sitting in Ohio has begun its own investigation of the corrugated container industry. Deposition of Alex Hopkins, at 39-40.

Even if a witness establishes that he has a reasonable fear of self-incrimination and that there is some risk of prosecution, he can be compelled to testify if he is first granted "use" immunity pursuant to 18 U.S.C. §§ 6001-6003. Section 6002 provides that when a witness is compelled by a disctrict court order to testify over a claim of fifth amendment privilege:

> [T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

In *Kastigar* v. *United States,* 406 U.S. at 453, 92 S.Ct. at 1661, the Supreme Court held that section 6002 immunity "from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."

Franey and Hopkins both were granted such statutory immunity upon the Government's petitions for immunity orders to compel testimony before the Houston grand jury or at the criminal trial.[4] Section 6003 provides that an immunity order may be entered only at the request of a United States Attorney. Since the Government is not a party to the private antitrust action, a new grant of statutory immunity to compel the desposition testimony of Franey and Hopkins was unavailable. *In re Daley,* 549 F.2d 469, 479 (7th Cir.), *cert. denied* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977).

The district court found, however, that no new grant of immunity was necessary since the deposition testimony of Franey and Hopkins would be "clearly and throughly derived from the immunized testimony previously given" and thus inadmissible in "any conceivable future prosecution." Record in No. 80-1338 at 19, 20. Because the deposition testimony would be thus "tainted," the court reasoned, neither witness could have a "legitimate fear of self-incrimination." *Id.* at 20, 25.[5]

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[4] Before Franey was granted statutory immunity during the criminal trial, the Department of Justice gave him a letter promising him immunity in exchange for his answers to interview questions posed by a Department of Justice attorney. Since we suppose that the district court could have based its order compelling Franey to answer deposition questions solely on the grant of statutory immunity, we find it unnecessary to consider the validity of the letter grant of immunity.

[5] The district court relied on *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979), as authority for its ruling. In *Starkey,* the court held that a witness at a civil deposition had no right to invoke his fifth amendment privilege against self-incrimination since the deposition testimony would be tainted by grand jury testimony that the witness had given under a grant of immunity. For the reasons we state in text, we disagree with the Eighth Circuit's apparent assumption that the district court had the authority to determine whether the grand jury testimony would be "tainted." Nevertheless, the result in *Starkey* may well be correct since the state attorney general, the only potential prosecutor, was a party to the civil litigation and was the party seeking the deposition testimony. By arguing that the testimony would be tainted, the attorney general conceded that the testimony would be inadmissible in a future prosecution. This concession may itself have operated as a grant of immunity.

The district court's reasoning indicates that the court had misconstrued its role in applying the immunity statute. Since the witnesses had not been—in fact, could not have been—granted immunity to compel their deposition testimony, the only issues before the court were the two comprised within the test restated by this court in *Wehling:* whether answers to the deposition questions might tend to reveal that the witnesses have engaged in criminal activities, and whether the witnesses face possible criminal prosecution. The court apparently attempted to fit its rulings within the framework of this test when it suggested that the deposition testimony would not be "incriminatory" since it would be "tainted." The existence of immunity or of derivative "taint" would have no bearing on the question whether testimony would be "incriminatory," however. Incriminatory testimony is simply testimony that suggests that the witness may have committed a crime. When incriminatory testimony is offered under a grant of immunity, the testimony remains incriminatory despite the immunity. Thus it was inappropriate for the court, in applying the two-part test to determine whether the witnesses were entitled to invoke the fifth amendment, to consider whether the testimony was "tainted" such that it could not be used against them in future criminal prosecutions.

Nor did the immunity statute itself confer on the court the power to rule that Franey and Hopkins must testify on the ground that the compelled testimony would be "derived from the immunized testimony previously given." Although it is true that section 6002 contemplates that district courts will have the responsibility of determining what is a derived use of immunized testimony, the authority to make that determination is restricted to the situation where the witness has been indicted and the Government is seeking to introduce evidence to secure a criminal conviction. This notion that the issue of "taint" can be raised only in such a context is implicit in the decisions holding that the Government must bear the burden of dis-

proving "taint". In *Kastigar,* for example, the Supreme Court observed that once a defendant demonstrates that he has testified under a grant of immunity, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460, 92 S.Ct. at 1665. Since the Government must bear the burden of proof on the issue of "taint," it follows that the issue was not properly raised in the present case, where the Government is not even a party.

The district court's rationale for compelling Franey and Hopkins to testify could be applied to override the fifth amendment claim of any witness any number of times, so long as the witness has previously testified under a grant of immunity. A court's role in the procedure that the district court has adopted would be to probe the mind of the questioner to ascertain that he is familiar with the substance of the immunized testimony. Even if the questioner were ignorant of the prior testimony, the court could ensure "taint," and thus compel the witness to answer, by seeing to it—as the court did here—that the questioner had a transcript of the immunized testimony on which to "base" his questions. And even if the court's finding that the witness' testimony would be "derived" from immunized testimony were manifestly wrong, the court's order compelling the testimony would operate to immunize the testimony because of "the well-established rule that if a district court errs in making a ruling on privilege an after-the-fact exclusionary rule will apply to prevent the introduction of that evidence against the witness." *In re Folding Carton,* 609 F.2d at 872, n. 11.[6] The resulting proliferation of "immunized" testi-

[6] This "exclusionary" rule does not itself buttress the order compelling Franey and Hopkins to testify. As the *Folding Carton* court emphasized, the rule "is solely remedial and cannot be used as a rationale to support a judicial decision which contravenes the fifth amendment's protection." *In re Folding Carton Antitrust Litigation,* 609 F.2d 867, 872, n. 11 (7th Cir. 1979).

mony would make it almost impossible for the Government, in a subsequent criminal trial, to sustain its heavy burden of proving that its prosecution is untainted.

In the absence of the district court's ruling that their deposition testimony would be "derived" from immunized testimony, Franey and Hopkins certainly could have legitimately invoked their privilege to remain silent. It is only the court's finding that their testimony will be "tainted" that is offered to support the abrogation of their fifth amendment privilege. In effect, then the district court has granted immunity to Franey and Hopkins of its own accord.[7] In addition to being contrary to the explicit provisions of the immunity statute that provide for an order of immunity only on the application of a government attorney, the court's action undermines the policies of the statute. As the Seventh Circuit observed in *In re Daley,* 549 F.2d at 478-479 (7th Cir. 1977):

> [O]nce the bar of the privilege against self-incrimination has been raised by the witness, the decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law. Therefore, the relative importance of particular testimony to federal law enforcement interests is a judgmental rather than a legal determination. . . .
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[7] *See Ellis* v. *United States,* 416 F.2d 791 (D.C. Cir. 1969). In *Ellis,* a trial court had rejected a witness' claim of fifth amendment privilege on the ground that the testimony could not be used against the witness in a future prosecution, regardless of the correctness of the court's ruling. The court of appeals repudiated the trial court's ruling, holding that the ruling, which was "a circular, self-fulfilling prophecy that in substance can only be viewed as a grant of immunity," was outside the scope of judicial authority. *Id.* at 796.

> Although it is correct . . . that federal courts possess inherent equitable powers over their own process in order to secure judicial proceedings from abuse, *United States* v. *United Fruit Company,* 410 F.2d 553 (5th Cir.), *cert. denied sub nom. Standard Fruit and Steamship Co.* v. *United States,* 396 U.S. 820, 90 S.Ct. 59, 24 L.Ed.2d 71 (1969), the immunity order which is issued pursuant to 18 U.S.C. § 6003 is not a matter of judicial process or judicial discretion. The immunity power originates in the legislature, *United States* v. *Bryan,* 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950); its exercise is delegated solely to the executive . . . Consequently, the determination of whether the conferral of immunity is proper in a particular case "requires intimate familiarity with the nature and details of the investigation and the background of the witness." *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 100, 84 S.Ct. 1594, 1614, 12 L.Ed.2d 678 (1964) (White, J., concurring). This is knowledge to which the federal prosecutor, and not the federal court, is privy, and it is therefore the authority of the United States Attorney to confer such extensive immunity which must be scrutinized.

(Some citations omitted.)

The Supreme Court, also, has indicated that courts have only a limited role in applying immunity statutes and no inherent power to grant immunity. In *Ullmann* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), the Court rejected the contention that the federal immunity statute unconstitutionally required a district court to act outside of its "judicial power":

> Since the Court's duty under the [predecessor of the present immunity statute] is *only* to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney, and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of "judicial power."

Because the district court's orders are supported by neither the immunity statute nor any authority inherent in the court, we hold that the district court lacked the power to enter the orders

compelling Franey and Hopkins to answer deposition questions and adjudging them in contempt for their continued refusal to answer. Those orders are therefore VACATED.

FRANK M. JOHNSON, Jr., Circuit Judge, dissenting:

There is no question but that the majority opinion is correct that it is beyond the authority of a district judge unilaterally to grant immunity to compel deposition testimony. *See* 18 U.S.C. § 6003; *In re Daley,* 549 F.2d 469, 479 (7th Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977). However, a grant of immunity under 18 U.S.C. § 6001 *et seq.* such as that received by appellants for their grand jury testimony covers any information "directly or indirectly derived" from the immunized testimony. The district judge held that because the appellants' deposition questions were based entirely on the earlier immunized testimony, the deposition testimony would be sufficiently "tainted" by the earlier testimony so as to bar its use against appellants in any subsequent criminal proceeding. In other words, the deposition testimony would be precluded as a derivative use. The majority reverses the district judge because, according to it, the district court lacked authority to make that determination.

It has always been for the courts to determine whether an assertion of the privilege is proper. *Hoffman* v. *United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951); *United States* v. *Melchor Moreno,* 536 F.2d 1042, 1046 (5th Cir. 1976). Courts have also always decided the taint question—whether evidence should be excluded as derivative of immunized testimony. *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964), and *Kastigar* v. *United States,* 406 U.S. 441, 460, 92 S.Ct. 1653, 1664, 32 L.Ed.2d 212 (1972), place a very high "affirmative duty" upon the prosecution "to prove that the evidence . . . is derived from a legitimate source wholly independent of the compelled testimony." This burden has been interpreted strictly against prosecutors. *See, e. g., United States* v. *Nemes,* 555 F.2d 51, 55 (2d

Cir. 1977) (lack of access to immunized testimony is not sufficient); *United States* v. *McDaniel,* 482 F.2d 305, 311-12 (8th Cir. 1973). It is my judgment that any prosecutorial use of the deposition testimony required by the district judge would, without any question, be barred as derivative of the compelled evidence.

The majority opinion is correct that the taint issue has usually arisen when prosecutors tried to introduce evidence in a criminal trial. That is to be expected. I do not think, however, that the conclusion ineluctably follows that a prospective determination of taint such as that the district judge made here exceeds judicial authority. Such prospective determinations have in the past been made. *See Appeal of Starkey,* 600 F.2d 1043, 1046 (8th Cir. 1979); *Patrick* v. *United States,* 524 F.2d 1109, 1120 (7th Cir. 1975) (Stevens, J.).[8] Since both logic and prior authority in my judgment dictate a result contrary to that reached by the majority, I respectfully dissent.

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[8] Decisions to the contrary are: *In re Folding Carton Antitrust Litigation,* 465 F.Supp. 618, 628 (Northern District of Ill.) *Rev'd on other grounds,* 609 F.2d 867 (7th Cir. 1979) (per curiam); *cf. Ellis* v. *United States,* 416 F.2d 791, 796 (D.C. Cir. 1969).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO** **ALL ACTIONS EXCEPT:** **FRANKLIN CONTAINER CO., ET AL., CIVIL ACTION NO. H-78-671**	M.D.L. No. 310

PRETRIAL ORDER NO. 40

ORDER ADJUDGING CHARLES JEROME FRANEY TO BE IN CIVIL CONTEMPT OF COURT

Class plaintiffs have made oral application pursuant to Title 28, § 1826, United States Code, for an order adjudging one CHARLES JEROME FRANEY to be held in civil contempt of this court for his refusal, without lawful cause or excuse, to answer certain questions posed to him during the course of his oral deposition duly noticed and taken during the course of the above entitled litigation. Mr. Franey, on advice of counsel, has consistently refused to answer deposition questions as to his possible participation in an alleged price-fixing conspiracy in the corrugated container industry on the grounds that such answers might tend to incriminate him. He is an employee of Mead, a defendant in this litigation, in their corrugated division.

Mr. Franey has twice testified under grants of immunity as to the subject matter of this litigation. In August of 1977, he submitted to an interview by the Department of Justice in

connection with a grand jury investigation of this industry. That testimony was given subject to a letter grant of immunity. He subsequently testified at the trial of several of the entities indicted by the grand jury, under an additional grant of immunity pursuant to 18 U.S.C. § 6002. Clearly, Mr. Franey cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar* v. *United States,* 406 U.S. 441 (1972); *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964). The immunized testimony cannot be used against him either directly or derivatively, as is made clear both by the statute itself and by the case law. *Kastigar* at 560. The question at issue at this time is whether that use immunity will be nullified if the witness now repeats his testimony at deposition.

Case law on this narrow point is quite scanty, only two reported cases having dealt with it. *In re Order of Civil Contempt against Carlos Lee Starkey,* 600 F.2d 1043 (8th Cir. 1979); *In re Folding Carton Antitrust Litigation,* 465 F. Supp. 618 (N.D. Ill. 1979), *rev'd on other grounds,* 609 F.2d 867 (7th Cir. 1979). In *Starkey,* the court found there was no possibility of a prosecutor's using such deposition testimony, since it was clearly and thoroughly derived from the immunized testimony previously given. In *Folding Carton,* although ruling on other grounds that the witness had no substantial fear of prosecution, the court stated in *dicta* that it was not willing to make a prospective determination as to whether such deposition testimony was so derived from the immunized testimony as to make it unusable by some hypothetical later prosecutor.

It is the opinion of this court that it must make that determination. During the course of the lengthy investigation into the corrugated container industry and of a three-and a half month trial in the criminal cases, hundreds of employees in the industry testified to matters which would possibly be incriminating to them if they had not been granted immunity. There have been blanket invocations of the fifth amendment by

many, many of these same witnesses when called for deposition in these civil cases. It is essential to the discovery in this case and to the orderly preparation of the case for trial that the court make some determination as to the validity of these invocations of their fifth amendment rights. The court is in no way extending the previous immunity grants; merely it is determining the validity of a refusal to answer questions, which refusal is based on an asserted fear of future prosecution. *Zicarelli* v. *New Jersey Investigation Commission,* 406 U.S. 472 (1972); *United States* v. *Melchor Moreno,* 536 F.2d 1042 (5th Cir. 1976).

The Court has therefore listened to the questions put to Mr. Franey, has studied the transcripts of his trial testimony and his interview with the government, and has ruled that all such questions may be answered without subjecting Mr. Franey to any possibility of future prosecution. This is because all the questions are either taken verbatim from the transcripts of his immunized testimony or are so closely related in subject matter and so clearly derived from the immunized testimony as to be thoroughly tainted and inadmissible against him in any conceivable future prosecution. In the extremely unlikely event that Mr. Franey is ever prosecuted by any sovereignty for matters raised by his answers to these questions, the prosecutor will have the heavy burden of proving that his case was derived wholly from independent evidence, and that burden could not be met as to this deposition testimony. Here there is no question as to whether the attorney conducting the deposition had access to the immunized testimony, a point which clearly troubled the court in *Folding Carton;* this court has read the relevant pages of the immunized testimony and ascertained that the questions asked were either taken verbatim from it or were very closely related to it. There is no question either as to whether Mr. Franey has somehow waived his immunity, as was done in *United States* v. *Kuehn,* 462 F.2d 427 (7th Cir. 1977). Mr. Franey has asserted his fifth amendment right and refused

to answer, and he will only answer under this court's order compelling him to do so.

Finally, this order does not, as has been argued by two witnesses similarly situated, convert the use immunity granted Mr. Franey into transactional immunity. Mr. Franey remains hypothetically liable to prosecution for any crimes he may reveal in his testimony; merely he cannot be incriminated as to them by any evidence taken from his testimony or derived from it, however remotely. This use immunity, which the Supreme Court has held to be coextensive with the fifth amendment privilege, is all Mr. Franey is entitled to receive under 18 U.S.C. § 6002, and this order neither enlarges nor diminishes the scope of that immunity.

THEREFORE, the said CHARLES JEROME FRANEY having knowingly and wilfully refused to obey said order which was made in the presence of said CHARLES JEROME FRANEY and his counsel in open court on March 5, 1980, as more fully appears in the record of these proceedings, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said CHARLES JEROME FRANEY shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said CHARLES JEROME FRANEY shall be and hereby is ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of 60 days, or until such time that said CHARLES JEROME FRANEY is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said CHARLES JEROME FRANEY shall not exceed the life of the above-entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that said CHARLES JEROME FRANEY shall be and hereby is fined $5,000.00, which amount shall be paid at the time this order becomes final, unless said CHARLES JEROME FRANEY is then willing to testify and answer the questions which this court has ordered him to answer.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that this order shall be stayed until 5:00 p.m. CST, March 6, 1980, and shall expire at that time unless said CHARLES JEROME FRANEY shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals for the Fifth Circuit, and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal, at which time this stay shall expire.

DONE at Houston, Texas, this 6th day of March, 1980

JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO ALL ACTIONS EXCEPT** **FRANKLIN CONTAINER CORP. ET AL., C. A. NO. H-78-671**	M.D.L. No. 310

PRE-TRIAL ORDER NO. 44

Plaintiffs' motion to compel production of documents from the American Paper Institute having been presented to the court and the court having studied the document requests and the briefs on this matter, it is ORDERED that American Paper Institute shall produce within fifteen days all documents not previously produced, in its possession or control, which are responsive to paragraphs 4, 6-8, 11-14, 16-21 of the subpoena duces tecum addressed to and served upon the American Paper Institute and paragraphs 4, 6-8, 11-14 and 16-23 of the subpoena duces tecum addressed to the Fourdrinier Kraft Institute and served upon the American Paper Institute, except that the documents to be produced shall be limited to those which refer either to corrugated products or to linerboard, as that term is defined in the Schedule of Documents. Class plaintiffs shall reimburse the American Paper Institute for the reasonable costs of compliance with the subpoenas.

2. The motions to withdraw their requests for exclusion from the class of Sky View Cooling Company and Cook Producing, Inc. are GRANTED. Those two entities shall now be members of the class and subject to the provisions of Pretrial Order No. 35, paragraph 5(b) and (c).

3. Alex Hopkins, a witness who gave immunized testimony in the grand jury investigation of the corrugated container industry in Houston and also in the trial of H-78-11 and H-78-12 in this court, and who has refused to answer on deposition in this civil cause verbatim questions from and questions derived from the same substantive matters as covered in his immunized testimony, in spite of this court's ruling that such answers would be so clearly and thoroughly derived from the immunized testimony that they could never be used to prosecute Mr. Hopkins and therefore that he has no legitimate fear of self-incrimination, it is hereby ORDERED, ADJUDGED, and DECREED that said Alex Hopkins shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said Alex Hopkins shall be and hereby is ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of 60 days, or until such time that said Alex Hopkins is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said Alex Hopkins shall not exceed the life of the above-entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that said Alex Hopkins shall be and hereby is fined $5,000.00, which amount shall be paid at the time this order becomes final, unless said Alex Hopkins is then willing to testify and answer the questions which this court has ordered him to answer.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that this order shall be stayed until 5:00 p.m. EST, March 20, 1980, and shall expire at that time unless said Alex Hopkins shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals for the Fifth Circuit and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal, at which time this stay shall expire.

DONE at Houston, Texas, this 20th day of March 1980.

JOHN V. SINGLETON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 14, 1980

TO ALL PARTIES LISTED BELOW:

NO. 80-1284 —CORRUGATED CONTAINER ANTI
80-1307 TRUST LITIGATION,
80-1338 CHARLES J. FRANEY, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By _____
Deputy Clerk

cc: Mr. Robert H. Singleton
Mr. Harold C. Gaebe, Jr.
Mr. Harold F. Baker
Mr. Stephen D. Susman
Mr. Barry T. McNamara
Mr. Jerry G. Hill

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation
M.D.L. 310

ADAMS EXTRACT COMPANY, ET AL.,

Petitioners,

v.

CHARLES J. FRANEY AND ALEX HOPKINS,

Respondents.

BRIEF OF RESPONDENT, CHARLES J. FRANEY, IN OPPOSITION TO PETITION FOR CERTIORARI

COUNSEL OF RECORD:

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IN THE

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Respondents.

BRIEF OF RESPONDENT, CHARLES J. FRANEY, IN OPPOSITION TO PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals for the Fifth Circuit does not, in affording to Respondent, Charles J. Franey, his Fifth Amendment protection, conflict with that of the Eighth Circuit Court of Appeals. The judgment re-affirms settled law limiting the source of immunity grants to the Executive Branch and the role of the Judicial Branch in applying immunity statutes. There are no Rule 17 "special or important" reasons for granting a writ of certiorari.

ARGUMENT

Deep concern has been expressed over the possible abuse of the immunity process in private litigation. The Court in *United States* v. *Dunham Concrete Products, Inc.*, 475 F.2d 1241 (5th Cir.) *cert. denied*, 414 U.S. 832 (1973) stated at 1245-46:

> A zealous antitrust plaintiff could easily immunize an entire industry from criminal prosecution under the antitrust laws.

The Court there pointed out that a decision to prosecute criminal violations could, thus, become a decision, not of responsible government officials, but of private antitrust plaintiffs.

The District Court in *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618 (N.D. Ill.) *rev'd on other grounds*, 609 F.2d 867 (7th Cir. 1979) refused to broaden through private litigation the scope of 18 U.S.C. Sec. 6001 *et seq* immunity granted in a grand jury proceeding, to encompass testimony in a subsequent civil deposition, and stated at 629:

> Such an expansion of the witnesses' immunity would come at the plaintiffs' request, not the government's. Plaintiffs would essentially be in the position of granting immunity which is a result inconsistent with Congress' antitrust policy (citations omitted) and with congressional policy limiting the power to authorize grants of immunity to the Executive Branch. (citations omitted) Under circumstances where the witnesses have "a reasonable fear of prosecution" compelling the deposition testimony of these five witnesses would essentially constitute an impermissible transformation of the limited "use" immunity grant envisioned under Sec. 6002 into a "transactional" immunity grant.

In this private litigation, however, the antitrust plaintiffs succeeded in persuading the trial court to grant additional, purported immunity at plaintiffs' request. This, notwithstanding the role of the federal court in the immunity process has been clearly defined. The Seventh Circuit in *In re Daley* 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977) stated at 479 (citations omitted):

> The role of the Federal Court is restricted to a ministerial function. The Court may scrutinize the record to ascertain that a request for immunity is, under the statute, jurisdictionally and procedurally well founded, and accompanied by the approval of the Attorney General. Under no circumstances, however, may a Federal Court prescribe immunity on its own initiative, or determine whether application for an immunity order which is both jurisdictionally and procedurally well founded, is necessary, advisable or reflective of the public interest, for the federal judiciary may not arrogate a prerogative specifically withheld by Congress.

This limited role of the Judicial Branch has been indicated by this Court in *Ullman* v. *United States,* 350 U.S. 422, 76 S. Ct. 497, 100 L. ED. 511 (1956) rejecting the contention that the federal immunity statute unconstitutionally required a district court to act outside its "judicial power":

> Since the Court's duty under the (predecessor of the present immunity statute) is *only* to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of "judicial power."

But, here the trial court attempted to broaden and extend Section 6001 *et seq* immunity from testimony given in a criminal proceeding to testimony given in a civil and private one. This, without consultation with, intervention by, or approval of the Executive Branch.

Petitioners do not argue that Section 6001, *et seq* immunity confers "transactional" immunity. It clearly does not. Nor do Petitioners deny the risk to Respondent, Franey, notwithstanding Sec. 6001, *et seq* immunity, of future prosecution based upon any self-incriminating information "derived from a legitimate source wholly independent of the compelled testimony". This Court has confirmed such risk in *Kastigar* v. *United States,* 406 U.S. 441 (1972).

This Respondent, then, is exposed to future prosecution for any illegal activities revealed in a civil deposition which the district court ordered given. In *United States* v. *Kuehn,* 562 F.2d 427, 432 (7th Cir. 1977), the Court held that a grand jury witness who repeated, without a separate grant of immunity, his immunized grand jury testimony in subsequent criminal trials and to a newspaper reporter created independent sources of evidence which could be used against him in a subsequent state prosecution. And in *United States* v. *Seiffert,* 501 F.2d 974 (5th Cir. 1974) the Court held that a civil deposition, in which a witness repeats testimony immunized in a prior proceeding, constitutes an independent source of evidence that can be used against the witness in subsequent criminal prosecutions.

Under *Kastigar* criminal prosecution based on a "wholly independent source" is approved. There, it is demonstrated that Sec. 6001, *et seq* immunity affords no protection for any self-incriminating information disclosed by the witness on any other occasion before or after trial testimony. Respondent, Franey's, deposition could provide such a "wholly independent source" from his Sec. 6001 *et seq* immunized testimony. A new, unprotected source of evidence would be created, exposing Respondent, Franey, to future prosecution.

But, Petitioners contend, under Sec. 6001, *et seq*, immunity any answers Respondent, Franey, may give to questions related to antitrust violations which are asked in a subsequent, civil deposition are sterilized. They are "tainted" by such grant of immunity; protected by it, Petitioners argue, because the answers to such questions are "directly or indirectly derived", within the meaning of 18 U.S.C. Sec. 6001-6003 from Respondent, Franey's, prior immunized criminal trial testimony.

Petitioners insist the District Court can determine now — at the time the civil deposition questions are asked — the nature of Respondent, Franey's, answers. This, because the prior immunized, criminal trial testimony has been transcribed and

made available for study to plaintiffs and the trial court; and the civil deposition questions asked will either be taken verbatim from such transcripts or are so closely related in "subject matter" as to be questions "directly or indirectly derived" therefrom. Therefore, the trial court may determine *prospectively* that Respondent, Franey's, answers to civil deposition questions, although not necessarily the same questions as those propounded during Respondent, Franey's, criminal trial testimony, will elicit substantially the same answers related to the same subject matter. Thus, say Petitioners, such answers will be so "directly or indirectly derived" from Respondent, Franey's immunized, criminal trial testimony as to be protected by 18 U.S.C. Sec. 6001-6003.

The Court in *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618 (N.D. Ill.), *rev'd. on other grounds*, 609 F.2d 867 (7th Cir., 1979) warned against such prospective determination by a trial court at 629:

> [W]e could not prevent the civil depositions from covering topics and incidents far beyond the scope of grand jury testimony [immunized under 18 U.S.C. Sec. 6001 *et seq*]. Even assuming that we ordered a release of the prior immunized testimony and confined plaintiffs to asking questions which were actually asked under the grand jury immunity grant, we could not prevent the deponent from testifying at greater length and detail about potentially incriminating transactions.

Accepting, *arguendo*, that any testimony may be compelled in this situation, here the trial court's "guidelines" contained in its pretrial orders are simply of no guidance. The distinction between testimony which may be compelled, because protected, and testimony which may not be compelled, because not "closely related in subject matter", as designated by the trial court, clarifies little. Answers at civil deposition to questions not propounded during the immunized, criminal trial testimony; a further explanation; refreshed recollection; even answers which may be inadvertently inconsistent with earlier answers, may strip

the witness of his constitutional protection. In the circumstances of this case, wherein the grand jury investigation and criminal trial are not coextensive with plaintiffs' action in terms of violations alleged, parties involved, geographic scope or even time period, it simply is not true that all deposition questions are or can be "derived" from the immunized, criminal trial testimony of a witness.

PETITIONERS' AUTHORITIES DISTINGUISHED

Respondent submits that the Eighth Circuit authorities, *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979) and *Little Rock School District* v. *Borden, Inc.*, 1980-2 Trade Cases Par. 63,522 at p. 76,783 (8th Cir. 1980) are not in conflict with the Fifth Circuit's holding here. As pointed out in footnote No. 5 of its opinion in 620 F.2d 1086 the Fifth Circuit stated at 1092:

> Nevertheless, the result in *Starkey* may well be correct since the state attorney general, the only potential prosecutor, was a party to the civil litigation and was the party seeking the deposition testimony. By arguing that the testimony would be tainted the Attorney General conceded that the testimony would be inadmissible in a future prosecution. This concession may itself have operated as a grant of immunity.

In the analogous *Borden* case the same principle applies. In *Starkey* and *Borden* the Eighth Circuit did not have to speculate as to the prosecutor's ability to circumvent its rulings as to the future admissability of the compelled testimony in a criminal prosecution. The prosecuting government conceded its inadmissability and was bound by its stated position thereafter. Furthermore, the *Starkey* and *Borden* court emphasized that the deposition testimony would only be immunized to the extent that it was within the guidelines set out by the court, and stated in *Starkey* at 1048:

> We note that in testifying at the deposition, appellant is required to answer only questions which are within the

same time, geographical and substantive framework as the grand jury testimony.

No such judicial guidelines or limitations exist here. The trial court ruled by pretrial order that all deposition testimony "related in subject matter" would be tainted by prior grants of immunity. No definitive guidelines for the use of Respondent's transcripts in the deposition were thereby provided.

Petitioners do not deny that Respondent's answers to the proposed questions may tend to incriminate. Nor do they deny that a risk of prosecution exists. Respondent submits these are the issues for the trial court's determination, since Respondent had not been granted immunity to compel his civil deposition testimony. There, the role of the trial court should have ended. In proceeding further, however, the trial court would strip Respondent of his Fifth Amendment protection. Surely, this constitutional bulwark cannot be dissipated, and its purpose jeapordized, through the vehicle of a private, civil lawsuit in which plaintiffs seek their own financial gain.

CONCLUSION

Respondent respectfully submits that Petitioners have failed to sustain their burden under Rule 17. The Court of Appeals correctly held that the trial court was in error in adjudging Respondent in contempt and properly vacated such order.

Respectfully submitted,

By: .....

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No. 80-788

MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation

M.D.L. 310

ADAMS EXTRACT COMPANY, ET AL.,

Petitioners,

v.

CHARLES J. FRANEY AND ALEX HOPKINS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT ALEX HOPKINS

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QUESTION PRESENTED

Does a court have the power to determine prospectively that deposition testimony will be tainted by previously immunized testimony in a legal proceeding in which the Government is not a party?

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT ALEX HOPKINS

STATEMENT OF THE CASE

On September 14, 1976, a federal grand jury in the Southern District of Texas investigating the pricing practices of the corrugated container industry issued a subpoena to Mr. Alex Hopkins. At that time Mr. Hopkins was the Sales Manager for MacMillan Bloedel Containers in Little Rock, Arkansas. On October 6, 1976, Mr. Hopkins testified before the grand jury pursuant to an order of immunity which had been entered upon application of the United States Attorney under 18 U.S.C. §§6001-6003. A transcript of Mr. Hopkins' testimony was made

available to the plaintiffs in this case by court order dated January 25, 1980.

As a result of the investigation, the grand jury returned indictments in *United States* v. *International Paper Company, et al.*, No. 78-H-11 and *United States* v. *Boise Cascade Corporation, et al.*, No. 78-H-12 (S.D. Tex. 1979). The indictments alleged price fixing in the corrugated container industry over many years. The federal prosecutor sought and obtained a second order of immunity for the testimony of Mr. Hopkins at the criminal trial. Mr. Hopkins testified at that trial on March 12, 1979.

After the criminal trial, the plaintiffs in this private antitrust action sought to take the deposition of Mr. Hopkins. Mr. Hopkins appeared for the deposition on January 30, 1980. Mr. Hopkins gave his name, address, occupation and employment background, but as to all other questions claimed his constitutional privilege against self-incrimination.

On March 5, 1980, Charles J. Franey, another witness similarly situated, appeared in open Court before United States District Judge John V. Singleton, Jr. and refused to answer deposition questions. In Pretrial Order No. 40 ("PTO 40") entered on March 6, Judge Singleton ruled that the deposition questions "may be answered without subjecting Mr. Franey to any possibility of future prosecution." The Court reached this conclusion "because all the (deposition) questions are either taken verbatim from the transcript of his immunized testimony or are so closely related in subject matter and so clearly derived from the immunized testimony as to be thoroughly tainted and inadmissible against him in any conceivable future prosecution." Accordingly, the Court held Mr. Franey in civil contempt for the continued invocation of his Fifth Amendment privilege.

On March 19, 1980, the deposition of Mr. Hopkins resumed. As he had done on January 30, Mr. Hopkins declined to answer questions by claiming his constitutional privilege. The deposition was recessed and continued in open Court before Judge

Singleton. Counsel for the plaintiffs asked Mr. Hopkins verbatim questions from Mr. Hopkins' grand jury testimony and some questions described by counsel for the plaintiffs as "questions we believe are derived from the substance of the previous questions." Counsel for the plaintiffs then asked Mr. Hopkins some verbatim questions from his March 12, 1979, trial testimony and what counsel described as "questions that are derived from the substance of those questions." Upon advice of counsel, Mr. Hopkins refused to answer all of these questions and invoked his Fifth Amendment privilege against self-incrimination. Mr. Hopkins related a fear of prosecution because a federal grand jury in Ohio was presently investigating the corrugated industry and because Mr. Hopkins was closely acquainted with many people who would be prospective witnesses during that investigation.

The District Court held Mr. Hopkins in civil contempt for his refusal to answer. The Court's decision was reduced to writing in Pretrial Order No. 44 ("PTO 44") dated March 20, 1980. The order states:

> "Alex Hopkins, a witness who gave immunized testimony in the grand jury investigation of the corrugated container industry in Houston and also in the trial of H-78-11 and H-78-12 in this court, and who has refused to answer on deposition in this civil cause verbatim questions from and questions derived from the same substantive matters as covered in his immunized testimony, in spite of this court's ruling that such answers would be so clearly and thoroughly derived from the immunized testimony that they could never be used to prosecute Mr. Hopkins and therefore that he has no legitimate fear of self-incrimination, it is hereby ORDERED, ADJUDGED, AND DECREED that said Alex Hopkins shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, §1826, United States Code and the Federal Rules of Civil Procedure, ..."

Mr. Hopkins was sentenced to a term of confinement and the payment of a fine. The sentence was stayed in all respects during the pendency of a timely and expeditious appeal. Presumably the legal reasoning the District Court employed to reach its decision in PTO 40 applied to the action against Mr. Hopkins in PTO 44.

On June 19, 1980, the Fifth Circuit by a 2-1 vote vacated the order of the District Court compelling Mr. Hopkins to answer deposition questions and adjudging him in contempt for his refusal. *In re Corrugated Container Antitrust Litigation*, 620 F.2d 1086, 1095 (5th Cir. 1980). The Court of Appeals reasoned that "the district court's orders are supported by neither the immunity statute nor any authority inherent in the court . . . ." Id.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly determined that two prior grants of immunity in criminal proceedings do not supplant the protection afforded a witness by the Fifth Amendment. The immunity statute protects only the source of testimony. The rendition of the testimony at a civil deposition creates a new source. Another grand jury is investigating potential antitrust violations in the corrugated container industry. If Mr. Hopkins should be accused of a crime, there is no guarantee that another court will find deposition testimony by Mr. Hopkins to be tainted by the testimony given by him with immunity. Thus, the Fifth Circuit properly ruled that the issue of taint cannot be determined prospectively. In addition, since the Government would not be a party to any deposition in this proceeding, this case does not conflict with cases cited by Petitioners in which courts ruled that governmental action in eliciting the testimony provided the witness with immunity.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT PRIOR IMMUNITY DOES NOT PROTECT THE WITNESS WHEN HE IS LATER ASKED INCRIMINATING QUESTIONS IN A CIVIL DEPOSITION.

The Fifth Circuit found that the questions plaintiffs seek to ask Mr. Hopkins concern his "knowledge of and participation in the alleged nationwide price-fixing conspiracy. (His) answers to the deposition questions may well reveal that (he has) violated federal and state antitrust laws." 620 F.2d at 1092. Petitioners in no way challenge this finding. The Fifth Circuit also ruled that the risk of future prosecution must be gauged by the standard set forth by the Seventh Circuit in the case of *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979):

> "When a witness can demonstrate any possibility of prosecution which is more than fanciful, he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster."

The Fifth Circuit found that Mr. Hopkins faces more than a fanciful risk of prosecution because of an ongoing grand jury investigation in Ohio concerning the corrugated container industry. 620 F.2d at 1091-1092. The Petitioners contest neither the *Folding Carton* standard nor its application to Mr. Hopkins.

Under the terms of PTO 44, all deposition questions were to be taken verbatim from the immunized transcripts or "derived from the same substantive matters contained in his (Mr. Hopkins') immunized testimony." Petitioners contend that this limitation relieves Mr. Hopkins from any danger he would otherwise face in answering the deposition questions. The Court of Appeals correctly ruled that this limitation does not supplant the protection afforded Mr. Hopkins by the Fifth Amendment.

This Court's decision in *Kastigar* v. *United States*, 406 U.S. 441 (1972), noted that the immunity section of the 1970 Organized Crime Control Act, 18 U.S.C. §§6001-6003 provides only use immunity, not transactional immunity. If the prosecution can show that the evidence against an immunized witness is not derived directly or indirectly from the testimony the witness gave under immunity, then the Government may prosecute the witness for the crimes described in his testimony. From *Kastigar* one vital principle emerges — use immunity protects the source of the testimony; transactional immunity protects the substance.

Every time a witness makes a statement, he creates a source. "The mere fact a witness has given testimony under immunity at one legal proceeding does not, by that fact alone, taint the same testimony given at a subsequent legal proceeding." *Appeal of Starkey*, 600 F.2d 1043, 1046 (8th Cir. 1979). Otherwise, the Government would not have sought a separate grant of immunity for Mr. Hopkins at the criminal trial. Rather, the Government would have relied on the immunity grant Mr. Hopkins received when he gave similar testimony before the grand jury. The testimony Mr. Hopkins would give in a deposition unquestionably creates a different source from the testimony he gave under immunity. The plaintiffs are not confined to asking questions identical to those in the prior grand jury and trial transcripts. Furthermore, Mr. Hopkins' deposition answers may go beyond those he gave in 1976 and 1979. Judge Singleton, though, has in effect immunized any answers Mr. Hopkins may give in direct contravention of the well-established principle that it is solely the function of the Executive Branch to determine if a witness' answers should be immunized. *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

Judge Singleton held that since plaintiffs had access to the immunized testimony, the deposition testimony would be necessarily derived from the immunized testimony and thus tainted.

Judge Singleton's "holding" is nothing more than a prediction that all future prosecutors and courts will agree that the deposition testimony will be tainted. Unfortunately, case law shows that Mr. Hopkins cannot be completely confident that other courts will agree with Judge Singleton. In *United States* v. *Rice*, 421 F.Supp. 871 (E.D. Ill. 1976), *reversed sub nom, United States* v. *Kuehn*, 562 F.2d 427 (7th Cir. 1977), a witness testified under immunity before a federal grand jury and voluntarily repeated the same testimony later to a news reporter. The witness was then indicted in state court. In an action by the United States Attorney to enjoin the state prosecution, the United States District Court implicitly found that the repetition of the testimony was not a source independent from the immunized testimony. The Court of Appeals disagreed and stated that the two sources were independent. *Rice* and *Kuehn* illustrate how two different courts can reach opposite results on the question of whether a source is tainted or independent. Mr. Hopkins should not have to run the risk that another court will consider his deposition to be an independent source. The Fifth Circuit was therefore correct in holding that the question of taint can only be determined in a proceeding in which the Government seeks to introduce a witness' unimmunized testimony. But the Government is not a party to this case and cannot seek immunity for Mr. Hopkins. 620 F.2d at 1093.

The Fifth Circuit's holding is not undercut, as Petitioners suggest, by the fact that the Petitioners had access to the grand jury testimony and would use that testimony to formulate the deposition questions. The part of the District Court opinion in *In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 629 (N.D. Ill. 1979), *vacated and remanded*, 609 F.2d 867 (7th Cir. 1979), not reached on appeal shows why access to the grand jury transcripts is irrelevant:

> "Barring this Court's order of a release of the immunized grand jury testimony to the plaintiffs prior to any compelled deposition, we could not prevent the civil depositions

> from covering topics and incidents far beyond the scope of the grand jury testimony. Even assuming that we ordered a release of the prior immunized testimony and confined plaintiffs to asking questions which were actually asked under the grand jury immunity grant, we could not prevent the deponent from testifying at greater length and detail about potentially incriminating transactions."

This passage underscores why the Fifth Circuit's decision is correct even though plaintiffs have the grand jury and trial testimony — the source of incrimination is not the question; the source is the answer.

II. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT CREATE A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners contend that the opinion of the Fifth Circuit conflicts with the opinions of the Eighth Circuit in *Starkey*, supra, and of the Seventh Circuit in *Patrick* v. *United States*, 524 F.2d 1109 (7th Cir. 1975). Such a conflict does not exist for one very important reason. In *Starkey* and *Patrick*, the Government was a party; in this case, the Government is not a party.

In *Starkey*, the State of Arkansas filed a civil antitrust suit against several dairies. Starkey was an employee who had previously testified before a federal grand jury under an order of immunity. The State represented to the Court that the State would consider any deposition testimony to be derived from the grand jury testimony. The Fifth Circuit properly found that this representation operated in effect as a grant of immunity by the State of Arkansas, the only potential sovereign from whom Starkey feared prosecution. In this case Judge Singleton attempted to taint the potential deposition testimony even though the Executive Branch was not involved.

In *Patrick*, the plaintiff gave immunized testimony before a federal grand jury. Based on what it had learned from that testimony, the Government filed a jeopardy tax assessment against Patrick. Patrick then sought to enjoin the assessment claiming that otherwise he would have to file a tax refund suit in which he would have to testify and incriminate himself. The Seventh Circuit rejected this argument by holding that Patrick need not fear prosecution following the refund suit. The Seventh Circuit did not, as Petitioners contend, make a prospective determination of taint resulting in a conflict with the instant case. Rather, the Seventh Circuit ruled that Mr. Patrick would be forced to testify in the refund suit only because the Government used the immunized testimony as a basis for the assessment. Thus the Government gave Patrick an "implied immunity" for testimony in the refund suit. 524 F.2d at 1120.

The foregoing analysis of *Patrick* and *Starkey* demonstrates that no conflict among the Circuits exists. Unlike *Starkey* and *Patrick*, in this case the Government is not a party. In the only other court decision in a purely private action to consider whether a formerly immunized witness could later be compelled to give a civil deposition if there were any possible prosecutions on the horizon, the court said that it would not make a prospective determination of taint. *Folding Carton*, supra, 465 F.Supp. at 629.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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Supreme Court, U.S.
FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

No. 80-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re Corrugated Container Antitrust Litigation
M.D.L. 310.

ADAMS EXTRACT COMPANY, ET AL.,
Petitioners,

vs.

CHARLES J. FRANEY AND ALEX HOPKINS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Pandick Press Midwest, Inc., Chicago • 454-7600

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. INTRODUCTION

Respondents have failed to distinguish appellate authority in direct conflict with the decision of the Fifth Circuit below and their citation to and discussion of irrelevant authority does not support the Fifth Circuit's erroneous decision. Petitioners here simply point to the direct conflict between the Circuits on the important issues raised in this Petition and distinguish the authority relied upon by Respondents.

Petitioners also attach, as Appendix D, the Brief For The United States of America As Amicus Curiae in *In re Corrugated Container Antitrust Litigation, M.D.L. No. 310, Appeal of Philip L. Fleischacker.* As previously noted, (Petition p.3, n.1), the *Fleischacker* appeal, now pending before the Second Circuit, arises from the same factual setting and presents the identical legal issues as the case at bar. The Second Circuit invited the Department of Justice to submit an amicus brief in *Fleischacker* because the issues raised in these appeals directly impact the relationship between the executive and the judiciary in the administration of the federal immunity statute. The amicus brief, which was received by Petitioners after the Petition was filed, is reprinted in full and is a thorough statement of the views of the United States on the important issues raised herein.[1]

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[1] The Department of Justice did not submit an amicus brief in support of certiorari because by the time it learned of this Petition, it did not have sufficient time to prepare a response. The Department did state, however, that it would consider filing an amicus brief on the merits should certiorari be granted.

II. ARGUMENT

A. There Is A Direct Conflict Between The Circuits

Respondents claim that the Fifth Circuit's decision below in ruling that a court lacks authority to compel testimony derived from previously immunized testimony is not in conflict with the Eighth Circuit's decisions in *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979) and *Little Rock School District* v. *Borden, Inc.,* 1980-2 Trade Cases Paragraph 63,522 at p.76,783 (8th Cir. 1980), and with the Seventh Circuit's decision in *Patrick* v. *United States,* 524 F.2d 1109 (7th Cir. 1975). However there is no question that the decision below *is* in conflict with these decisions with respect to whether a court has authority to determine derived use in assessing the validity of a Fifth Amendment claim of privilege.[2]

Respondents' claim a lack of conflict between the decision below and the Eighth Circuit's decisions arguing that the testimony in those cases was compelled not because it was derived from immunized testimony and therefore unavailable for use in future prosecutions but because the Deputy Attorney General of Arkansas' *argument* that the testimony would be derived from immunized testimony itself somehow operated as a grant of immunity. However, even a brief review of the Eighth Circuit's opinion in *Starkey* reveals that it compelled Starkey's testimony because the testimony was derived from

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[2] Because it ruled it did not have *authority* to do so, the Fifth Circuit below did not reach Petitioners' Question Presented No. 3, whether deposition testimony is "derived from" previously immunized testimony under the federal immunity statute, where a transcript of the immunized testimony is used by deposing counsel to formulate the deposition questions. Thus, as pointed out by the Department of Justice, the only court to rule on this issue, the Eighth Circuit in *Starkey,* held that the subsequent testimony would be derived. (App. 17d, n.9.)

immunized testimony.[3] Indeed, both the Court below and the Department of Justice[4] recognized the direct conflict between *Starkey* and the case at bar. In footnote 5 of the opinion below, cited by Respondent Franey to refute the existence of a conflict, the Fifth Circuit stated:

> In *Starkey,* the court held that a witness at a civil deposition had no right to invoke his fifth amendment privilege against self-incrimination since the deposition testimony would be tainted by grand jury testimony that the witness had given under a grant of immunity. *For the reasons we state in text, we disagree with the Eighth Circuit's apparent assumption that the district court had the authority to determine whether the grand jury testimony would be "tainted."* (App. 11a, n.5) (emphasis supplied.)

If after *Starkey* there was any doubt as to the Eighth Circuit's exercise of its authority to determine derived use in the context of a motion to compel testimony, that doubt was dispelled by the decision of a separate Eighth Circuit panel in *Little Rock School District* v. *Borden, Inc., supra.* In that case, contrary to Respondent Franey's claim, the court once again compelled testimony as derived from immunized testimony without reference to an implied grant of immunity.

Respondent Hopkins' claim that the Seventh Circuit did not make a "prospective" determination of "taint" in *Patrick* v. *United States, supra,* is equally unfounded. In *Patrick,* Judge

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[3] In *Starkey,* the Eighth Circuit stated:

> The state prosecutor was never requested to give Starkey immunity from criminal prosecution. Nevertheless, Starkey clearly has immunity from criminal prosecution for the deposition testimony because such testimony would be tainted by the federal grand jury, testimony for which Starkey received "use" immunity pursuant to 18 U.S.C. § 6001 *et seq.*

Starkey, *supra,* 600 F.2d at 1046.

[4] The Department of Justice, recognizing the direct conflict between the circuits, found the Eighth Circuit's reasoning as to why a court does have authority to determine derived use in this context to be "more persuasive." (App. 23d-25d.)

(now Justice) Stevens reasoned that a witness would not incriminate himself by his testimony in a civil suit because the testimony would be "indirectly derived from" the questioner's (in this case, the government's) use of the witnesses' immunized grand jury testimony. *Id.* at 1120. As in *Starkey* and *Borden,* the Government's participation as a party to the suit in *Patrick* was irrelevant to the determination of derived use.[5]

Thus this Petition presents a direct conflict between the decision below and decisions in the Seventh and Eighth Circuits over the issue of a court's authority to determine derived use in assessing the validity of a Fifth Amendment claim.[6]

B. Respondents' Arguments On The "Merits" Are Irrelevant To This Petition

Unable to distinguish appellate authority in direct conflict with the decision below, Respondents have tried to obscure the issues in this Petition on their merits through citation of authority not relevant to this case. For example, Respondents cite cases such as *In re Daley,* 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977) and *Ullman* v. *United States,* 350 U.S. 422 (1956), for the proposition that a court has no power to grant immunity absent a request from the Department of Justice. While Petitioners in no way dispute this authority, they assert that the issue is not whether a court can grant immunity,

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[5] The Department of Justice agreed that the presence of the Government as a party in *Starkey* had "no bearing on the question whether the civil testimony is derived from the immunized testimony." (App. 19d.) The Department also cited *Patrick* in support of the proposition that "a court may—and indeed must—determine the scope of immunity already granted when necessary to determine whether a claim of privilege is valid." (App. 24d.)

[6] The district court's refusal to reach the taint issue in *In re Folding Carton Antitrust Litigation,* 465 F.Supp. 618 (N.D. Ill.), rev'd on other grounds, 609 F.2d 867 (7th Cir. 1979), is yet another example of the conflict among the courts below concerning these important issues.

but whether under this Court's decisions in *Kastigar* v. *United States,* 406 U.S. 441 (1972) and *Hoffman* v. *United States,* 341 U.S. 479, 487 (1951), a court must determine derived use in assessing the validity of a Fifth Amendment claim. Petitioners submit that such a ruling is within the courts' traditional powers and does not amount to a judicial grant of immunity.

A court's determination of "derived use" under the immunity statute is no different from a court's determination of statute of limitations or double jeopardy bars, rulings routinely made in Fifth Amendment proceedings to assess whether a claim of privilege is valid. Moreover, a court's decision to compel testimony "derived from" immunized testimony will not frustrate the congressional purpose to grant the executive branch discretion in conferring immunity. *In every instance in which a court finds that testimony will be "derived from" immunized testimony, the Department of Justice will have already decided to grant the witness immunity, as was done here with Respondents Franey and Hopkins.* Thus it is the prosecutor, not the subsequent judge or deposing counsel, who has balanced the public need for testimony against its interest in criminally prosecuting the individual. Since the prosecutor makes that decision knowing that any future prosecution will have to be based on evidence obtained from wholly independent sources, a court's requiring testimony derived from prior immunized testimony can in no way affect the decision to grant immunity in the first place.

Nor will a decision to compel derivative testimony impede prosecutions based on independent evidence. As pointed out in the Justice Department amicus, "if the judge limits the scope of the questioning to matters within the scope of the immunized testimony, it is unlikely that prosecutoral efforts will be hampered." (App. 18d, 11.). Moreover, as the Department noted, "this interpretation of the immunity statute would have the beneficial effect of allowing private litigants to obtain relevant

testimony that otherwise might be unavailable because of witnesses' claims of Fifth Amendment privilege." (*Id.*)[7]

Respondents' also confuse the issues on the merits of this action through citation of cases such as *In re Folding Carton Antitrust Litigation, supra, United States* v. *Kuehn* 562 F.2d 427 (7th Cir. 1977), and *United States* v. *Seiffert,* 501 F.2d 974 (5th Cir. 1974). In each of those cases it was properly determined that evidence or testimony was *not* "derived from" immunized testimony because the immunized testimony was *not used* to produce the subsequent statements.[8] Here, however,

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[7] This Court's decisions in *Kastigar* v. *United States,* 406 U.S. 441 (1972) and the recently decided *United States* v. *Apfelbaum,* 445 U.S. 115 (1980), quite simply and compellingly demonstrate that the Fifth Amendment privilege against self-incrimination must be interpreted to permit maximum testimony and evidence while simultaneously protecting the individual involved from criminal prosecution. That the need for evidence is paramount and can co-exist with the legitimate scope of the privilege is demonstrated in *Apfelbaum* where this Court noted that a witness must testify even though his immunity is *not* coextensive with the protection that would be obtained from silence:

> Such grants of immunity would not provide a full and complete substitute for a witness's silence because, for example, they do not bar the use of the witness's statements in civil proceedings. Indeed, they fail to prevent the use of such statements for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution .... such as threats of liability in civil suits, disgrace in the community, or the loss of employment.
>
> Id. at 124-125.

[8] The case of *United States* v. *Rice,* 421 F.Supp. 871 (E.D. Ill. 1976), rev'd on other grounds, sub nom, *United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977) does, however, illustrate the operation of the *Kastigar* requirements of an independent source. In *Rice,* a state prosecutor's reading of immunized federal grand jury transcripts was found to have influenced his questions in a state grand jury proceeding against the same witness so as to taint the testimony in the state proceeding. The court's reasoning in *Rice* thus fully supports the

(Footnote continued on following page.)

there is no dispute over Petitioners' use of Respondents' immunized testimony in developing the sought after deposition testimony. Thus in deciding the derivative use issues this Court's attention will more properly be drawn to cases such as *United States* v. *Nemes,* 555 F.2d 51 (2nd Cir. 1977), *United States* v. *Kurzer,* 534 F.2d 511 (2nd Cir. 1976), *United States* v. *First Western State Bank of Minot,* 491 F.2d 780 (8th Cir.), *cert. denied,* 419 U.S. 825 (1977), and *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973), in which use of immunized testimony was found to taint evidence or testimony obtained through that use. (*See also App.* 15d-20d.)

Finally, Respondents claim that certiorari should be denied arguing that the District Court did not follow the Eighth Circuits' guidelines in *Starkey* that "only those questions which are within the same time, geographical and substantive framework of the (immunized) testimony," need be answered. *Appeal of Starkey, supra,* 600 F.2d at 1048. However, the scope of any taint is a false issue, not properly before this Court since it was not addressed by the court below. Moreover, any dispute over the *application* of the *Starkey* guidelines does not bear on the need to grant certiorari on the important issue of a court's authority to determine derived use in assessing the validity of a Fifth Amendment claim.

(Footnote continued from preceding page.)

proposition that where immunized testimony is used to develop questions in a subsequent proceeding, the testimony in that proceeding will be deemed "derived from" the compelled testimony.

In *United States* v. *Kuehn, supra,* the Seventh Circuit reversed, and in dicta, rejected the district court's finding not because use of immunized testimony to frame questions in a subsequent proceeding would not taint the subsequent testimony, but because the prosecutor had adequately proved that he did *not use* the immunized testimony but relied instead upon independent sources of information for the subsequent examination.

III. CONCLUSION

The Fifth Circuit's erroneous decision below is in direct conflict with the decisions of other Courts of Appeals and with this Court's decisions in *Kastigar* v. *United States, supra,* and *Hoffman* v. *United States, supra.* Witnesses, regardless of the jurisdiction in which they happen to be found, should be required to testify if their testimony, because it is derived from immunized testimony, can not be used in prosecutions against them. The Fifth Circuit's refusal to exercise its inherent judicial authority to prevent improper invocations of the Fifth Amendment privilege will keep important testimony from the trier of fact and, in cases such as this, will frustrate Congressional policy to encourage vigorous private enforcement of the antitrust laws.

For all of the foregoing reasons and those contained in the Petition, Petitioners respectfully request that a writ of certiorari be granted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80-1090

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION,

M.D.L. No. 310

APPEAL OF PHILLIP L. FLEISCHACKER, *Deponent.*

On Appeal from the United States District Court for the Southern District of New York, Honorable John V. Singleton, Jr., Judge, Presiding Pursuant to 28 U.S.C. 1407(b).

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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November, 1980

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for the Southern District of New York,
Honorable John V. Singleton, Jr., Judge, Presiding
Pursuant to 28 U.S.C. 1407(b).**

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

ISSUE PRESENTED

Whether a witness who claims his Fifth Amendment privilege against self-incrimination may be compelled to answer questions that are based on and confined to the subject matter, time and geographic scope of testimony previously given by that witness under a grant of immunity pursuant to the federal immunity statute, 18 U.S.C. 6001-6005.

STATEMENT

This is an appeal pursuant to 28 U.S.C. 1291 from an order issued by the Honorable John V. Singleton, Jr., Judge of the United States District Court for the Southern District of Texas, exercising the powers of a district judge in the Southern District of New York, pursuant to 28 U.S.C. 1407(b), in *Corrugated Container Antitrust Litigation,* M.D.L. No. 310. (A. 452-454.) Judge Singleton held appellant Phillip L. Fleischacker, a non-party witness, in civil contempt for his refusal, based on a claim of Fifth Amendment privilege, to answer questions at his deposition. Fleischacker was ordered confined pursuant to 28 U.S.C. 1826 and fined $5000. The order was stayed by Judge Singleton pending appeal.

Facts

In August 1977 appellant, Phillip L. Fleischacker, was subpoenaed to testify before a federal grand jury in the Southern District of Texas, which was investigating alleged price-fixing in the corrugated paper container industry. After Fleischacker invoked his Fifth Amendment privilege against self-incrimination, he was granted "use immunity" and ordered to testify pursuant to 18 U.S.C. 6002 and 6003. (A. 2.) He subsequently was interviewed by Department of Justice attorneys and gave testimony before the grand jury under that grant of immunity.

The grand jury returned two indictments charging several individual and corporate defendants with conspiracy to fix prices and otherwise restrain trade in the corrugated paper industry. Thirty defendants pled nolo contendere and were sentenced. Fleischacker, who was not named as a defendant, was subpoenaed to appear at the trial of the remaining defendants. Judge Singleton, presiding over the criminal trial, entered a second immunity order compelling Fleischacker's testimony at trial (A. 212), but Fleischacker was never called as a witness. The defendants who stood trial were acquitted.

While the grand jury investigation and criminal trial were in progress, purchasers of corrugated products filed numerous private treble damage actions alleging Sherman Act violations by corrugated paper manufacturers, some of whom were defendants in the criminal proceedings. In November 1977, the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. 1407, transferred these private actions to the Southern District of Texas for consolidated pretrial proceedings. *In Re Corrugated Container Antitrust Litigation,* M.D.L. No. 310.

After the conclusion of the criminal trial, Fleischacker was subpoenaed for deposition in New York on January 22, 1980, by the plaintiff class in the consolidated civil actions.[1] He appeared but declined on Fifth Amendment grounds to give any information except his name and his home address and telephone number. In February 1980, Judge Singleton ordered the disclosure of transcripts of grand jury testimony and related Department of Justice interviews of several witnesses, including Fleischacker, to counsel for plaintiffs in the consolidated civil actions.

On February 29, 1980, a second subpoena was issued from the United States District Court for the District of New Jersey, requiring Fleischacker to appear in New York on March 10, 1980 for further deposition. (A. 314.) On March 6, 1980, Judge Singleton issued Pretrial Order 39 (A. 316-317), which provided that he would preside, by telephone conference call or in person, at Fleischacker's deposition in the Southern District of New York, and, pursuant to 28 U.S.C. 1407, would exercise the powers of a District Judge for the Southern District of New York. The order, which was filed in the United States District Court for the Southern District of New York and served on Fleischacker, also directed Fleischacker to attend his deposition. On March 10, 1980, Fleischacker appeared for his

[1] Other witnesses who had appeared before the grand jury were also subpoenaed for depositions.

deposition in New York. Judge Singleton, in Houston, presided over the deposition by conference telephone connection.

Most of the questions asked of Fleischacker at his deposition were read verbatim from his immunized interview transcript; other questions were asserted by examining counsel to be derived from the interview or grand jury testimony.[2] As to each question, Fleischacker invoked his Fifth Amendment privilege against self-incrimination. Judge Singleton ordered him to respond on the ground that Fleischacker could have no legitimate fear of prosecution based on his answers, since they would be derived from his prior immunized testimony. Each time, Fleischacker restated his Fifth Amendment objection and persisted in his refusal to answer, and each time Judge Singleton held him in contempt for his refusal. At the termination of the deposition, Judge Singleton ordered Fleischacker confined for sixty days, pursuant to 28 U.S.C. 1826, and imposed a fine of $5,000. (A. 440.) The contempt order was stayed pending immediate appeal.

Fleischacker's Appeal

Because there was uncertainty as to which court of appeals had jurisdiction (see A. 317), Fleischacker appealed both to this Court and to the United States Court of Appeals for the Fifth Circuit. On April 7, 1980, this Court dismissed his appeal without prejudice to reinstatement if the Fifth Circuit held that it did not have jurisdiction.

The Fifth Circuit consolidated Fleischacker's appeal with the appeals of two other witnesses, Charles Jerome Franey and

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[2] Counsel present at the deposition, the witness, and the presiding judge had copies of transcripts of Fleischacker's two Department of Justice interviews and his grand jury testimony and referred to specific interview questions during the deposition. (A. 365-439.) Transcripts of the interviews, but not of the grand jury testimony (which consisted of only seven pages of transcript, see A. 436), are included in the appendix. (A. 3-211.)

Alexander Hopkins, who had been held in contempt by Judge Singleton for their refusals to answer similar questions in depositions taken in the Southern District of Texas. On May 7, 1980, the Fifth Circuit reversed the contempt citations against Franey and Hopkins[3] and dismissed Fleischacker's appeal for lack of jurisdiction. *In re Corrugated Container Antitrust Litigation,* 620 F.2d 1086 (5th Cir. 1980).

Fleischacker's appeal from Judge Singleton's March 10, 1980, orders holding him in contempt was redocketed here on May 15, 1980.

SUMMARY OF ARGUMENT

Whether the district court's order compelling testimony from appellant Fleischacker over his claim of Fifth Amendment privilege against self-incrimination should be affirmed or reversed depends on the scope of a grant of immunity under the federal immunity statute, 18 U.S.C. 6001-6005. For the Fifth Amendment prohibits compulsion of testimony only if the testimony might tend to show that the witness has engaged in criminal activity and if there is a possibility that it may be used against the witness in a criminal prosecution.

One reasonable interpretation of the immunity statute is that it prohibits use against Fleischacker of the testimony sought from him in this case. For the statute protects a witness from use of evidence "derived from" his immunized testimony. And in this case it is clear that the transcript of testimony given by Fleischacker under a grant of immunity in a prior proceeding was used by examining counsel during the deposition and provided the basis for the questions Fleischacker refused to answer. Those questions were read directly from, or were

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[3] This brief does not address the law of the case arguments presented by Fleischacker, but we do not believe that the Fifth Circuit's decision binds the Second Circuit on this appeal.

closely related in subject matter and time to, his immunized testimony. If this is the correct interpretation of the statute, Fleischacker had no Fifth Amendment right to remain silent, and the district court's order compelling his testimony should be affirmed.

The other reasonable interpretation of the immunity statute is that it does not extend to testimony given in a subsequent proceeding by the immunized witness himself. If the witness voluntarily answers questions based on his prior immunized testimony, that testimony is not compelled, and there is no Fifth Amendment prohibition on its use against the witness. But the witness need not give any new testimony that might incriminate him. He has the opportunity to assert his Fifth Amendment rights when he is asked questions based on his prior testimony, and if he does so, as Fleischacker did, he cannot be compelled to give incriminating testimony. Thus, with respect to any testimony sought from the immunized witness himself in a subsequent action, the witness' Fifth Amendment rights are fully protected by preserving this right to remain silent. There is, accordingly, no need to interpret the prior grant of immunity to displace the constitutional privilege. If this is the correct interpretation of the statute, the district court erred in overruling Fleischacker's Fifth Amendment claim, and the order compelling his testimony should be reversed.

ARGUMENT

I. THE FIFTH AMENDMENT FORBIDS COMPELLED TESTIMONY ONLY IF THAT TESTIMONY MAY BE USED TO PROSECUTE THE WITNESS.

The duty to provide testimony when called by a court or grand jury and the corresponding power of the court to compel testimony are firmly established in American law. See *Kastigar* v. *United States,* 406 U.S. 441, 443-445 (1972). But the Fifth Amendment limits in an important respect the government's power to compel testimony by providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' This means not only that a defendant may not be compelled to take the stand in a criminal trial, but also that the government may not compel any testimony that might later be used to prosecute the witness.

If no criminal prosecution of the witness can arise from his testimony, however, the public interest in obtaining that testimony prevails. The Fifth Amendment does not allow a witness to remain silent even if his testimony will embarrass him, harm him in his business, subject him to civil liability, or incriminate others. See, *e.g., United States* v. *Apfelbaum,* 445 U.S. 115, 124-125 (1980); *Zicarelli* v. *New Jersey State Comm'n of Investigation,* 406 U.S. 472 (1972); *Gardner* v. *Broderick,* 392 U.S. 273, 279 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation,* 392 U.S. 280, 284-285 (1968); *Ullmann* v. *United States,* 350 U.S. 422, 430-431 (1956); *Rogers* v. *United States,* 340 U.S. 367 (1951); *Smith* v. *United States,* 337 U.S. 137, 147 (1949); *Brown* v. *Walker,* 161 U.S. 591, 605-606 (1896).

Because both the public interest in obtaining testimony and the witness' Fifth Amendment rights must be protected, a witness' claim of privilege does not automatically entitle him to remain silent. It is for the court, in each case, to determine whether the privilege is properly invoked. *Hoffman* v. *United*

States, 341 U.S. 479, 487 (1951); *Rogers* v. *United States, supra.* The witness may remain silent only if the court concludes that the testimony sought (1) might provide some evidence of his involvement in criminal activity and (2) might be used against him in a criminal prosecution. See *Kastigar* v. *United States, supra; Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964).

In determining whether testimony sought is potentially incriminating, the court must look to the questions themselves and the surrounding circumstances. *Hoffman* v. *United States, supra,* 341 U.S. at 486-489. The witness is not required to incriminate himself in order to demonstrate the validity of his claim of privilege, but where the possibility of incrimination is not evident from the questions, the witness must explain the basis for his assertion that the answers might be incriminating. *United States* v. *Melchor Moreno,* 536 F.2d 1042 (5th Cir. 1976); *United States* v. *Curcio,* 234 F.2d 470 (2d Cir. 1956), *rev'd on other grounds,* 354 U.S. 118 (1957). Testimony need not provide direct evidence of criminal activity in order to be incriminating; any testimony that might link the witness to criminal conduct or focus investigation on him is shielded. *Hoffman* v. *United States, supra,* 341 U.S. at 487; *Blau* v. *United States,* 340 U.S. 159, 161 (1950).

If the testimony sought may be incriminating, the witness need not show that it is likely that the evidence will be used against him, but there must be some possibility of such use. *United States* v. *Miranti,* 253 F.2d 135 (2d Cir. 1958); *In re Master Key Litigation,* 507 F.2d 292, 294 (9th Cir. 1974); *In re Folding Carton Antitrust Litigation,* 609 F.2d 867, 871-872 (7th Cir. 1979). Facts that create an absolute bar to use of the testimony will establish lack of basis for the claim of privilege. *Brown* v. *Walker, supra.*

The parties do not dispute the general principles applicable to assertions of Fifth Amendment privilege. Rather, what is at

issue is the effect of plaintiffs' use of appellant Fleischacker's prior testimony, given under a grant of "use immunity" pursuant to 18 U.S.C. 6002 and 6003, on his assertion of privilege in this case.[4]

Appellees contend, and Judge Singleton held, that Fleischacker has no Fifth Amendment right to refuse to answer the questions asked at his deposition. Because these questions were based on prior immunized testimony, they concluded that the statutory grant of immunity would prohibit use of Fleischacker's answers against him. Fleischacker contends that because he has not been granted immunity for any testimony he may give in this civil action, he is exposed to a risk of prosecution on the basis of his testimony, and thus that he has a Fifth Amendment right to remain silent.

II. IT COULD BE CONCLUDED THAT THE FEDERAL IMMUNITY STATUTE PROHIBITS USE AGAINST FLEISCHACKER OF THE TESTIMONY SOUGHT, AND THUS THAT HE HAS NO FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

Under the first interpretation of the immunity statute, prosecutorial use of evidence derived from immunized testimony is prohibited by the immunity statute even when that evidence is the testimony of the immunized witness himself. If this is the correct interpretation, then, on the facts of this case, we agree with appellees that the testimony sought would be derived. But we emphasize that, to avoid encroaching on the executive power to control grants of immunity, the court should compel incriminating testimony over a claim of privilege only when it is clear that the testimony will be derived from prior testimony.

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[4] Neither party disputes that Fleischacker's interview statements, as well as the testimony he gave before the grand jury itself, were covered by the grant of immunity. (See A. 130.)

A. The Federal Immunity Statute Is Coextensive with the Fifth Amendment in Protecting a Witness Against Use of His Immunized Testimony.

Under the federal immunity statute, 18 U.S.C. 6001-6005, when a witness in a federal court proceeding claims his Fifth Amendment privilege, the government may obtain a court order compelling the witness to testify in that proceeding. 18 U.S.C. 6003. The witness may not then refuse to testify,

> but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. 6002.

The Supreme Court held this statute constitutional because it construed it to provide immunity coextensive with the scope of the Fifth Amendment privilege not to incriminate oneself—"immunity from the use of compelled testimony and evidence derived therefrom." *Kastigar* v. *United States, supra,* 406 U.S. at 443 (1972); see also *United States* v. *Apfelbaum, supra,* 445 U.S. at 123. The Court in *Kastigar,* while rejecting the contention that full transactional immunity is the only constitutionally sufficient substitute for the Fifth Amendment right to remain silent,[5] emphasized that protection against

[5] Petitioners in *Kastigar* had based their argument that transactional immunity was required in *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892). In *Counselman,* the Court had invalidated a statute that afforded a witness "protection only against the use of the specific testimony compelled from him under the grant of immunity" because it " 'could not, and would not, prevent the use of his testimony to search out other testimony to be used against him.' " 406 U.S. at 450, quoting 142 U.S. at 564. The Court added: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." 142 U.S. at 585-586.

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direct use of compelled testimony is not sufficient. Immunity from indirect use is also required.[6] The immunity statute is constitutional only because "[i]t prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453 (emphasis in original). Like the Fifth Amendment itself, the statute "assure[s] that the compelled testimony can *in no way* lead to the infliction of criminal penalties." 406 U.S. at 461 (emphasis added).[7] This constitutional requirement that a witness compelled to testify under a grant of immunity be fully protected from prosecutorial use of his compelled testimony places the burden on the government, in any prosecution of a witness who has testified previously under a grant of immunity, to demonstrate that it has relied solely on evidence from

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Later cases suggested that while derivative use immunity was required, full transactional immunity was not. See *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Murphy* v. *Waterfront Comm'n, supra*. In the Organized Crime Control Act of 1970, Congress repealed a variety of immunity statutes—most of which provided transactional immunity—and enacted more limited use and derivative use immunity provisions in 18 U.S.C. 6001-6005. See S. Rep. No. 91-617, 91st Cong., 1st Sess., 51-56 (1969); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., 42-46 (1970). In *Kastigar*, the Court referred to the statement in *Counselman* as not essential to the holding in that case. 406 U.S. at 451.

[6] Transactional immunity, however, "affords the witness considerably broader protection than does the Fifth Amendment privilege [which] has never been construed to mean that one who invokes it cannot subsequently be prosecuted." 406 U.S. at 453. Congress has the power to grant such broad immunity, but it is not constitutionally required.

[7] The statute does allow use of immunized testimony "in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [compelling immunized testimony]." 18 U.S.C. 6002. And that exception is constitutional. *United States* v. *Apfelbaum*, 445 U.S. 115 (1980).

"legitimate independent sources." *Id.* at 460, 462; *United States* v. *Kurzer,* 534 F.2d 511 (2d Cir. 1976); *United States* v. *Catalano,* 491 F.2d 268 (2d Cir.), *cert. denied,* 419 U.S. 825 (1974).

B. Testimony Obtained in Response to Questions Based on and Within the Scope of Immunized Testimony Is "Derived From" Immunized Testimony.

Evidence or testimony obtained by using a witness' immunized testimony is not evidence from an "independent source." It, therefore, cannot be used in prosecuting that witness.[8] See, *e.g., Kastigar* v. *United States, supra,* 406 U.S. at 454; *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979); *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977); *United States* v. *Kurzer, supra; United States* v. *Catalano, supra;* 268 (2d Cir. 1974); *United States* v. *First Western State Bank of Minot,* 491 F.2d 780 (8th Cir.), *cert. denied,* 419 U.S. 825 (1974); *United States* v. *McDaniel,* 482 F.2d 305 (8th Cir. 1973). Indeed, this Court has held that even testimonial evidence obtained from other witnesses is "derived" if immunized testimony was used to obtain it. See, *e.g., United States* v. *Kurzer, supra; United States* v. *Karathanos,* 531 F.2d 26 (2d Cir.), *cert. denied,* 428 U.S. 910 (1976).

Thus, in most cases, the close connection between the immunized testimony and testimony obtained by examining counsel in a subsequent proceeding, who has that testimony and uses it in examination covering the same subject matter and time period, would compel the conclusion that the subsequent testimony is "derived from" immunized testimony within the meaning of 18 U.S.C. 6002.

The only court to rule on the issue in the situation presented in this case—where the immunized witness is himself

[8] Use of immunized testimony to obtain derived evidence is not improper, of course, and such evidence may be used by private parties or the government for a variety of purposes.

the source of the derived testimony—held that such testimony would be within the protection afforded by the immunity statute. *Appeal of Starkey,* 600 F.2d 1043 (8th Cir. 1979).[9] Starkey had testified before a federal grand jury under a grant of immunity about matters that were the subject of a civil action subsequently brought by the State of Arkansas. The state obtained a transcript of Starkey's grand jury testimony and used it in deposing him in the civil action. The state's attorney asserted that the deposition questions were derived from the grand jury transcript, and some of the questions were read verbatim from the transcript. The Eighth Circuit held that any answers to questions within the scope of Starkey's immunized testimony would be "tainted" by the state's use of that immunized testimony. Thus Starkey's answers could not subject him to future prosecution, and he had no Fifth Amendment right to refuse to answer questions that were "within same time, geographical and substantive framework as the grand jury testimony." 600 F.2d at 1048. The court therefore affirmed an order holding him in contempt for refusal to answer such questions.[10]

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[9] In the Fifth Circuit *Corrugated* deponents' appeals, *In Re Corrugated Container Antitrust Litigation,* 620 F.2d 1086 (5th Cir. 1980) (Charles J. Franey and Alex Hopkins, Appellants), the court of appeals, for reasons with which we disagree, never reached the question whether the testimony would be derived. See pp. 24-26, *infra.*

[10] In *Little Rock School District* v. *Borden, Inc.,* 1980-2 Trade Cas. ¶ 63,522 (8th Cir. Sept. 9, 1980), the Eighth Circuit again addressed the question whether a witness has a Fifth Amendment right to refuse to give allegedly "derived" testimony. In that case it held that testimony given in a civil action in response to questions " 'within the same time, geographic and substantive framework as immunized grand jury testimony' " would be "derived" from immunized testimony even if the examining party did *not* have access to the grand jury transcripts. This holding is inconsistent with the basic principle that transactional immunity is not required by the constitution or the immunity statute and that independently obtained

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. The standard established by the court in *Starkey* is the appropriate one for determining whether testimony will be derived from immunized testimony: It is derived if examining counsel uses the immunized testimony in conducting the examination and if the examination is limited to the subject matter, time period and geographic scope of the immunized testimony.[11]

In this case Judge Singleton, presiding at the deposition, correctly determined that each of the questions asked satisfied this test. The private plaintiffs' counsel who deposed Fleischacker had access to Fleischacker's immunized testimony and admittedly relied on it in questioning him. Most of the questions asked of Fleischacker were read verbatim from the immunized interview transcript (see A. 365-449).[12] The only

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evidence may be used to prosecute a witness who has testified under a grant of immunity. See, *e.g., Appeal of Starkey, supra,* 600 F.2d at 1048, distinguishing *United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977) (statements of witness who repeated his immunized grand jury testimony to a newspaper reporter would be independent source). But in any event, the issue presented in *Little Rock* does not arise in this case because the examining lawyer did have the immunized testimony.

[11] This interpretation of the immunity statute would have the beneficial effect of allowing private litigants to obtain relevant testimony that otherwise might be unavailable because of witnesses' claims of Fifth Amendment privilege. As a practical matter, if the judge limits the scope of the questioning to matters within the scope of the immunized testimony, it is unlikely that prosecutorial efforts will be hampered. For the government usually will have no further interest in prosecuting the witness for any offenses suggested by such testimony or will be unable to do so in any event because of the difficulty of establishing that it has not used the immunized testimony itself.

[12] Only the questions, not Fleischacker's answers, were read as deposition questions. But we do not understand this to be the basis of appellant's argument that the questions are not derived from his

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questions that were not read verbatim dealt with the subject of any price communications between Fleischacker and representatives of other corrugated manufacturers (A. 405-408, 412-413, 419-420, 423-425).[13] This same subject was covered extensively in the immunized interviews (A. 7-128, 132-210), and Judge Singleton limited the questioning to 1970-1975, the time period covered by the grand jury's investigation (A. 405-406, 408, 413, 420, 423).[14]

Appellant seeks to distinguish *Starkey* on the ground that there the civil action was brought by the state rather than a private party and it was the state's attorney rather than counsel for a private plaintiff who argued that answers to questions based on prior immunized testimony would be tainted. But this distinction has no bearing on the question whether the civil testimony is derived from the immunized testimony. The court in *Starkey* held that the testimony sought could not be used in the subsequent civil action because it was derived from immunized testimony; it did not hold that the argument of the state's attorney operated as a separate grant of immunity for the new testimony. Thus its reasoning is fully applicable to this case.

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testimony—nor would this be a reasonable argument. Questions and answers are, in most cases, so interrelated in the examination of a witness that the questions themselves are to some extent derived from earlier answers. Indeed in overruling objections based on lack of foundation for questions read verbatim, Judge Singleton apparently looked to the answers previously given. (See, e.g., A. 388-389, 393.)

Similarly, questions seeking to fill in any gaps in the prior testimony, even if seeking new information, can reasonably be said to be based on the immunized answers. (See, e.g., A. 402-409, 412-413, 419-420, 423.)

[13] Fleischacker was also asked whether he appeared before the grand jury and was interviewed by the Department of Justice in 1977 (A. 380). The answer to that question does not appear to be derived from his testimony, but neither does it appear incriminating.

[14] No geographic limitation was imposed since the alleged conspiracies were nationwide.

Appellant admits that the testimony sought would be derived from immunized testimony "in a definitional sense" (Supp. Br. for Deponent-Appellant at 20) but contends that it would not be "derived" as Congress intended that term in Section 6002 and as the Supreme Court has interpreted it. Prosecutorial use of the testimony given in the civil action he asserts, "is *not* the type of derivative use prohibited by Section 6002 as anticipated in *Kastigar*" because "the connection [between the immunized testimony and the civil testimony] is wholly unrelated to any criminal prosecution or investigation." (*Id.* at 19-20).

Section 6002, however, contains no such limitation on the protection afforded to a witness whose immunized testimony is used to develop other evidence, nor is there any other support for appellant's contention that the participation of a private party severs the connection between immunized testimony and any evidence developed in a subsequent civil case in response to questions based on that testimony.[15]

C. Since There Was no Showing that His Testimony Might Incriminate Him by Showing Perjury in His Prior Testimony, Fleischacker Cannot Refuse to Testify on the Ground That His Testimony Could be Used in a Prosecution for Perjury.

Fleischacker also contends on appeal that his testimony cannot be compelled because it might provide evidence that

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[15] Indeed, in *United States* v. *Nemes,* 555 F.2d 51 (2d Cir. 1977), this Court suggested that evidence covered by an immunity grant might be derived through a private source. In that case, the court held that the government had failed to demonstrate the required independent source merely by denying that federal officials had seen or used testimony given by the defendant under a state grant of immunity. For, said the court, the fact that the federal officials have not seen the immunized testimony "does not preclude the possibility that someone who has seen the compelled testimony was thereby led to evidence that was furnished to federal investigators." 555 F.2d at 55.

could be used against him in a prosecution for perjury[16] or inconsistency in his prior immunized testimony. We agree that immunized testimony and information derived from such testimony may be used in a prosecution for perjury or giving a false statement in the immunized testimony. *United States* v. *Apfelbaum, supra; United States* v. *Wong,* 431 U.S. 174 (1977); *United States* v. *Mandujano,* 425 U.S. 564 (1976); *United States* v. *Housand,* 550 F.2d 818 (2d Cir.), *cert. denied,* 431 U.S 970 (1977); *United States* v. *Tramunti,* 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S 1079 (1974). Thus even if the testimony sought from Fleischacker would be derived from his immunized testimony within the meaning of that statute, it could be used against for that limited purpose. And a witness is entitled to claim the Fifth Amendment when the crime that might be revealed by his testimony is perjury in a prior proceeding. See, *e.g., United States* v. *Housand, supra; United States* v. *Partin,* 552 F.2d 621, 623 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977).

But Fleischacker never explained to the district court that the incrimination he feared related to perjury in his earlier testimony.[17] Nor did he show that he was likely to be endan-

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[16] Fleischacker apparently signed statements, under penalty of perjury, that his interview statements, as transcribed, were true and correct. (See A. 435.) The sworn statements do not appear with the copy of the interview transcripts included in the appendix.

[17] He argued only that his Fifth Amendment claim was valid because his testimony would not be information derived from the immunized testimony. Fleischacker's counsel, Mr. McNamara, addressing the court during the deposition, stated:

> "In asserting Fifth Amendment privilege Mr. Fleischacker is concerned that testimony he might give here today would form the basis for some prosecution of him by either an agency of the Government of the United States or an agency of the State of New York, or an agency of the State of New Jersey, and that he might be charged with a crime premised upon this testimony. It is our view, your Honor, that his testimony here today is not

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gered by his answers. See *United States* v. *Melchor Moreno, supra; United States* v. *Curcio, supra.*

There may be a theoretical possibility that a witness' testimony will show perjury in virtually every case where the witness has previously testified on the same or a similar subject. But if this possibility, without any explanation from the witness, were held sufficient to sustain a Fifth Amendment claim, it would be virtually impossible to get any testimony from such a witness.[18] To avoid this problem while protecting the witness' rights, the court, we suggest, should require that the witness—at the very least—make clear that it is perjury that concerns him

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> immunized, and that there is no authority to immunize his testimony here today. . ."

A. 391-392. See also A. 400-401, 403, 405, 413, 420 (objections on ground that questions are not derived from immunized testimony). Mr. McNamara cited *United States* v. *Housand, supra,* a case that did involve possible perjury incrimination. A. 420. But he did not question or disagree with the Court's response: "I understand that that case [*Housand*] dealt with perjured testimony. We don't have that question here." *Id.*

[18] In *United States* v. *Curcio, supra,* the Second Circuit addressed a somewhat similar problem. There, the secretary-treasurer of a labor union was subpoenaed to testify and produce documents before a grand jury. When he appeared before the grand jury he failed to produce the subpoenaed records and refused on Fifth Amendment grounds to answer questions about their whereabouts other than to state that such records existed but were not in his possession. In affirming an order holding him in contempt, the Second Circuit found that his vague contentions about possible incrimination were insufficient. Moreover:

> "This requirement to produce [documents] would be no more than an empty and meaningless form of words if the lawful custodian of the records could hand over possession to another and then refuse to say when or where he had last seen them on the ground that any testimony on the subject would tend to incriminate him. To sustain the privilege here asserted would provide an easy method by which any investigation could be hamstrung from the start." 234 F.2d at 475.

and give some indication of the basis for his fear of incrimination.[19] The court would then be in a better position to fulfill its obligation under *Hoffman* v. *United States, supra,* to determine whether the testimony might provide evidence of perjury and whether it might be used against the witness in a perjury prosecution.

Because Fleischacker failed to explain this aspect of his Fifth Amendment claim, the district court had no opportunity to determine its validity, and Fleischacker should not be permitted to make an argument based on possible use of his testimony to prove perjury for the first time in his appeal to this Court.

D. The Order Compelling Fleischacker's Testimony Was Not a Judicial Grant of Immunity.

Fleischacker argues that the district court's order compelling his testimony should be reversed because it confers immunity as to new testimony, and thereby intrudes on the power of the Department of Justice to control immunity grants. The Fifth Circuit, in its recent decision, *In re Corrugated Container Antitrust Litigation, supra,* accepted this argument and, therefore, refused to compel testimony from witnesses who, in circumstances identical to Fleischacker's, claimed Fifth Amendment privilege. But the Eighth Circuit in *Starkey, supra,* expressly rejected this argument. Assuming that an immunized witness' own subsequent testimony can be "derived" evidence within the meaning of the immunity statute, we find more persuasive the Eighth Circuit's reasoning as to why a court does have the power to determine whether the testimony sought will in fact be so closely connected to the immunized testimony as to be "derived".

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[19] In *Housand,* the witness had made clear that he feared his testimony would be used in a prosecution for perjury or inconsistent statements. See *United States* v. *Housand, supra,* 550 F.2d at 821. But in *Starkey,* where appellant did not raise the perjury issue, the court did not consider it.

It is true that a court has no power to grant immunity absent a request by the Department of Justice. See *Ullmann* v. *United States, supra; United States* v. *Turkish,* 623 F.2d 769 (2d Cir. 1980); *Ellis* v. *United States,* 416 F.2d 791, 796-97 (D.C. Cir. 1969); *In re Daley,* 549 F.2d 469 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977).[20] And it is also true that if a witness is compelled to testify over a claim of privilege, his answers may not be used against him. See *Maness* v. *Meyers,* 419 U.S. 449, 474-475 (1975) (White, J., concurring). This does not mean, however, that a court invades prosecutorial prerogatives when it determines that a witness' Fifth Amendment claim is without merit and orders him to testify.

As the Eight Circuit in *Starkey* and Judge Johnson dissenting in *Corrugated* explained, a court may—and indeed must—determine the scope of immunity already granted when necessary to determine whether a claim of privilege is valid. *Appeal of Starkey, supra,* 600 F.2d at 1047-1048; *In re Corrugated Container Antitrust Litigation, supra,* 620 F.2d at 1095. See also *Hoffman* v. *United States, supra; Patrick* v. *United States,* 524 F.2d 1109, 1120 (7th Cir. 1977).

Thus, if a witness' derived testimony is covered by the immunity statute, a court faced with a claim of Fifth Amendment privilege by a witness who has formerly testified under a grant of immunity must determine, for each question, whether the possibly incriminating testimony sought will be derived. If the court can determine that it will be, the claim of privilege must be denied and the witness ordered to testify.[21] But if the

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[20] 18 U.S.C. 6003 provides that the United States attorney may obtain an immunity order for a witness whose testimony is sought "at any proceeding before or ancillary to a court of the United States or a grand jury of the United States" if he determines that the testimony may be necessary to the public interest. The power is not limited to actions to which the United States is a party.

[21] By not compelling testimony if there is any doubt that it will be derived, the judge limits any risk of inadvertent judicial creation of immunity through failure to limit the testimony compelled to that which will actually be derived.

court finds a possibility that it will not be derived, the court should permit the witness to remain silent.[22] And the court should not issue a broad order compelling testimony, but should examine the questions individually to see that each arises from use of and is within the scope of the immunized testimony.

III. IT COULD ALSO BE CONCLUDED THAT THE IMMUNITY STATUTE DOES NOT PROTECT FLEISCHACKER FROM USE OF HIS OWN SUBSEQUENT TESTIMONY, AND THUS THAT HE DOES HAVE A FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

The immunity statute can also be construed, however, as not prohibiting prosecutorial use of testimony given in a subsequent proceeding by the immunized witness himself, even if that testimony is based on the witness' immunized testimony. If this is the correct construction of the statute, then Fleischacker should not be compelled to testify since he has asserted his Fifth Amendment privilege.

The alternative analysis we suggest differs from the argument made by the witness in this case and has not been discussed in the decisions construing the immunity statute, but we believe that it merits this court's consideration. It is based on two propositions: that the Fifth Amendment bars use of a witness' testimony against him only if that testimony is compelled; and that the immunity statute prohibits use of a witness' immunized testimony only to the extent necessary to provide the equivalent of the Fifth Amendment privilege, *Kastigar* v. *United States, supra.*

A witness who has testified under a grant of immunity has the opportunity, when called to testify in a subsequent action, to

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[22] Thus the Eighth Circuit ruled in *Starkey, supra,* that questioning would be limited to matters within the scope of the grand jury testimony. For if questions go beyond this there is reason to doubt that they result from use of the immunized testimony.

refuse to answer a question if he fears that his answer might provide incriminating information. Thus the situation where a witness is questioned using his immunized testimony is different from that in which evidence is derived from sources which the witness cannot control.[23]

If the witness freely chooses to answer questions based on his immunized testimony, the Fifth Amendment does not prohibit use of his answers against him, for the testimony has not been compelled.[24] And if he chooses not to testify voluntarily, he can assert his Fifth Amendment privilege and thus assure that no additional incriminating evidence will be created.[25] In either case, therefore, even if the testimony could

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[23] That is, whether subsequent testimony is covered by the immunity statute turns not on how it was obtained or how closely it is connected with the immunized testimony, but on whether the person from whom it is obtained is the immunized witness or some other party.

[24] Certainly, if a witness, having given immunized testimony at a trial, thereafter voluntarily answered questions asked by a reporter on the basis of that testimony, the previous grant of immunity should not bar the government from using the witness' voluntary incriminating statements against him, even though the questions and answers would in a sense be "fruits" of the immunized testimony. For it would be the witness' election to respond to the questions, rather than any compulsion proscribed by the Fifth Amendment, to which the incriminating statements would properly be ascribed. See *United States* v. *Kuehn,* 562 F.2d 427, 432 (7th Cir. 1977). There, as in the case of a witness who responds to questions based on his prior testimony in a formal proceeding without claiming his Fifth Amendment privilege, it could be said in a strict causal sense that the witness' answers would be derived from his immunized testimony. But the policies underlying the Fifth Amendment and 18 U.S.C. 6002 do not require that the prior immunity be construed to extend to such voluntary statements. See *Maness* v. *Meyers, supra,* 419 U.S. at 466, 470 (Stewart, J., concurring).

[25] Under this alternative construction of the statute, the court, before requiring the witness to testify, must determine whether the testimony may provide evidence of criminal conduct and whether

(Footnote continued on following page.)

otherwise be deemed derived under the standards discussed in part II of this brief, it is unnecessary to construe the prior grant of immunity to displace the witness' constitutional privilege.[26]

In this case, Fleischacker did assert his Fifth Amendment privilege when the subsequent testimony was sought. Therefore, if this interpretation of the statute is correct, the court should not have compelled him to testify but should have evaluated and ruled on his claim in the usual manner, basing its decision on the premise that the immunity statute would not preclude prosecutorial use of any incriminating testimony that Fleischacker might give.

(Footnote continued from preceding page.)

there is a possibility it may be used to prosecute the witness (see part I of this brief). If it compels testimony because one or the other of these requirements is not satisfied, it does not intrude on prosecutorial control of immunity by doing so. Of course, if the witness receives a new grant of statutory immunity, his testimony may then be compelled and cannot be used against him.

[26] This construction of the statute may make it more difficult for private parties to obtain testimony, and could also therefore, increase the number of requests to the Department of Justice for grants of immunity in private litigation. But it would give the government greater control over the scope of immunized testimony. For it reduces any possibility that, through collusion or otherwise, a private party might elicit immunized testimony that would impede prosecution of immunized witnesses.

CONCLUSION

The federal immunity statute governs the outcome in this case, and there are two reasonable ways of construing that statute. Neither is more clearly compelled by the language of the statute, its legislative history, or the public interest. Therefore, while we have suggested how this Court might analyze the issue presented, the United States takes no position as to whether this Court should hold that the testimony sought is within the protection of the immunity statute, and, therefore, affirm the contempt order, or whether it should hold that the statute does not prohibit prosecutorial use of a witness' own subsequent testimony, and, therefore, vacate the order.

Respectfully submitted,

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November, 1980

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